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CIVIL DISCOVERY IN OKLAHOMA REVISITED UNDER THE NEW CODE

Michael Minnis*

I. INTRODUCTION

Beginning in the winter of 1980 and concluding in the summer of 1981, the *Tulsa Law Journal* ran a three-part series on civil discovery in Oklahoma by Professor Charles W. Adams.¹ On April 27, 1982, Oklahoma Governor George Nigh signed House Bill No. 1912.² This Bill, known as the "Oklahoma Discovery Code" (the New Code),³ has, among other things, repealed fifty-eight sections from title 12 of the Oklahoma Statutes as of October 11, 1982.⁴ All of the repealed sections

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1. Adams, *Civil Discovery in Oklahoma: General Principles*, 16 TULSA L.J. 184 (1980) [hereinafter cited as Adams I]; Adams, *Civil Discovery in Oklahoma: The Discovery Tools*, 16 TULSA L.J. 658 (1981) [hereinafter cited as Adams II]; Adams, *Civil Discovery in Oklahoma: Depositions*, 17 TULSA L.J. 179 (1981) [hereinafter cited as Adams III]. The legislative history and a brief analysis of the New Code were the subjects of a previous article by this author in the *Oklahoma Bar Journal*. Minnis, *House Bill No. 1912: The New Oklahoma Discovery Code*, 53 OKLA. B.J. 1291 (1982).

2. Oklahoma Discovery Code, ch. 198, 1982 Okla. Sess. Law Serv. 422 (West).

3. *Id.* § 1, 1982 Okla. Sess. Law Serv. at 422 (to be codified at OKLA. STAT. tit. 12, § 3201).

4. *Id.* § 16, 1982 Okla. Sess. Law Serv. at 441-42 provides that OKLA. STAT. tit. 12, §§ 388, 390.1, 423, 425, 433-452, 461, 463, 481-485, 487, 488, 493, 496, 500, 505, 521-523, 537, 538.1-13, 548, 549, 1703.01, 3010 (1981) are repealed. Sections 1 through 15 of the session law, the substantive portions of the New Code, are to be codified as §§ 3201-3215 of title 12 of the Oklahoma Statutes. Oklahoma Discovery Code, ch. 198, § 17, 1982 Okla. Sess. Law Serv. 422, 442 (West).

House Bill No. 1912 has an "operative" date of October 1, 1982. *Id.* § 18, 1982 Okla. Sess. Law Serv. at 442. However, the emergency clause was defeated March 9th in the House by a vote

dealt, in one form or another, with discovery in civil litigation.⁵

The adoption of the New Code did not automatically make the detailed research of Professor Adams an anachronism. Much of the reform effected by the New Code simply gathers the discovery statutes in one place. If not literally the same, a good portion of the New Code retains the substance of many of the repealed statutes.

The drafters of the New Code relied heavily on the Federal Rules of Civil Procedure for much of the precise language used.⁶ The Oklahoma courts have consistently recognized that when the Oklahoma legislature enacts statutes adopted from another jurisdiction, the constructions placed on those statutes by courts of the other jurisdiction become persuasive authority when interpreting the Oklahoma statute.⁷ Accordingly, federal cases prior to adoption of the New Code interpreting the federal rules will undoubtedly be quite persuasive authority for the meaning of the New Code, particularly when the words in the New Code match exactly those in the federal rules.

Construction of federal laws and rules by federal courts prior to adoption of the New Code will undoubtedly receive the deference of the presumption emphasized above. However, many of the cases interpreting the federal rules do not reach the Supreme Court and many lower federal courts have given conflicting interpretations. In these cases, a weaker construction guide than "presumption" may be applicable.⁸ Further, there are several areas where the New Code differs from the federal rules.⁹

of 63-29. OKLA. HOUSE J. 479 (daily ed. Mar. 9, 1982). A two-thirds (68) vote of all members (101) of the House of Representatives was necessary to enact the emergency clause. Without passage of the emergency clause, an enacted bill does not become law until the 91st day after *sine die* adjournment of the session in which it was enacted. OKLA. CONST. art. V, § 58. Both houses of the 38th legislature adjourned *sine die* July 12, 1982.

5. *E.g.*, OKLA. STAT. tit. 12, §§ 433-452 (1981) (repealed 1982) (dealing with depositions); *id.* § 548 (repealed 1982) (discovery and production of documents).

6. *See* FED. R. CIV. P. 26-37.

7. *See, e.g.*, *Laubach v. Morgan*, 588 P.2d 1071, 1072-74 (Okla. 1978) (construing Oklahoma comparative negligence statutes based on an Arkansas statute); *Crossett v. Andrews*, 277 P.2d 117, 119 (Okla. 1954) (construing Oklahoma wrongful death statute which was adopted from Kansas); *Hinds v. Dandee Mfg. Co.*, 206 Okla. 392, 393-94, 243 P.2d 992, 994 (1952) (construing Oklahoma statute adopted from Kansas concerning competence of witnesses); *State v. Bennett*, 81 Okla. Crim. App. 206, 215-16, 162 P.2d 581, 585-86 (1945) (construction placed upon statute by federal courts is persuasive when the Oklahoma conspiracy statute was adopted from the federal statutes).

8. *See* *Stoll v. Allen*, 202 Okla. 514, 516, 215 P.2d 559, 562 (1948); *State ex rel. Westerheide v. Shilling*, 190 Okla. 305, 305, 307, 123 P.2d 674, 674, 676-77 (1942).

9. For example, compare FED. R. CIV. P. 26 (general provision governing the scope of discovery contains a provision allowing discovery of insurance agreements) and FED. R. CIV. P. 35 (court may, upon good cause, order a party whose mental or physical condition is in controversy to submit to examination) with Oklahoma Discovery Code, ch. 198, § 3, 1982 Okla. Sess. Law

The purpose of this Article is to update Professor Adams' series of articles on discovery by analyzing the changes wrought by the New Code. This Article will also highlight those areas in which the New Code differs from the Federal Rules.

II. PROCEEDINGS IN WHICH DISCOVERY IS AVAILABLE

As Professor Adams stated, the discovery procedures previously set forth in title 12 "are generally available in all civil actions."¹⁰ Apparently, ambiguity existed under the repealed statutes concerning use of discovery procedures in some court actions.¹¹ The New Code's procedures govern "the procedure for discovery in all suits of a civil nature in all courts in this state."¹² The limiting words in this definition of the scope of the New Code are "suits," "civil," and "courts."

Suit—This word is a "generic term, of comprehensive signification, and applies to any proceeding by one person or persons against another or others in a court of justice in which the plaintiff pursues, in such court, the remedy which the law affords him for the redress of an injury or the enforcement of a right, whether at law or in equity."¹³ The use of the word "suit" apparently limits the New Code to pending actions.¹⁴

Civil—This term includes all manner of suits not criminal. Civil

Serv. 422, 422-26 (West) (to be codified at OKLA. STAT. tit. 12, § 3203) (no provision for discovery of insurance agreements) and *id.* § 12, 1982 Okla. Sess. Law Serv. at 436-37 (to be codified at OKLA. STAT. tit. 12, § 3212) (party desiring to take the physical examination of another party may, in certain situations, do so merely by serving a request upon the other party).

10. Adams I, *supra* note 1, at 187. This includes, for example, probate proceedings and paternity proceedings. *Id.*

11. See, e.g., *Stone v. Hodges*, 435 P.2d 165 (Okla. 1967); 4 Okla. Op. Att'y Gen. 452 (1972). In *Stone*, the court addressed the question of whether OKLA. STAT. tit. 12, § 549 (1981) (repealed 1982), which allowed the use of interrogatories "in a civil action or proceeding," was applicable to probate proceedings in a county court. The court held that it was. 435 P.2d at 165, 167. In 1972, the Oklahoma Attorney General stated that OKLA. STAT. tit. 12, § 434 (1981) (repealed 1982), which provided for the taking of depositions, was applicable to bastardy proceedings. 4 Okla. Op. Att'y Gen. 452, 452 (1972).

12. Oklahoma Discovery Code, ch. 198, § 1, 1982 Okla. Sess. Law Serv. 422 (West) (to be codified at OKLA. STAT. tit. 12, § 3201).

13. BLACK'S LAW DICTIONARY 1286 (5th ed. 1979).

14. Adams I, *supra* note 1, at 188. However, the New Code contains a provision allowing a person to perpetuate either his own testimony or that of another prior to the institution of an action. Oklahoma Discovery Code, ch. 198, § 4, 1982 Okla. Sess. Law Serv. 422, 426-27 (West) (to be codified at OKLA. STAT. tit. 12, § 3204). This section requires that the person desiring to perpetuate the testimony file a verified petition "[t]hat the petitioner or his personal representative, heirs, beneficiaries, successors or assigns may be a party to an action cognizable in a court but is presently unable to bring it or cause it to be brought." *Id.* § 4(A)(1)(a), 1982 Okla. Sess. Law Serv. at 426 (to be codified at OKLA. STAT. tit. 12, § 3204(A)(1)(a)). Section 4 is substantially the same as FED. R. CIV. P. 27. See *infra* notes 120-25 and accompanying text.

discovery procedures have never been available in Oklahoma criminal actions.¹⁵

Courts—The Oklahoma Statutes contain many definitions of “courts.”¹⁶ However, none are general enough to be as inclusive as intended in the New Code. The use of the word “court” is often synonymous with the use of the word “judge.”¹⁷ Arguably, the word “courts” as used in the New Code includes every court so designated under the statutes of this state.¹⁸

If a proceeding is a suit of a civil nature filed in one of the state courts, the parties are entitled to discovery under the procedures outlined in the New Code. These procedures may also be applicable to other proceedings by reference.¹⁹

III. SCOPE OF DISCOVERY

Although several of the repealed statutes contained language defining the scope of discovery,²⁰ the general rule was judicially enunciated.

15. *Parmenter v. State*, 377 P.2d 842, 844 (Okla. Crim. App. 1963); *Adams I*, *supra* note 1, at 188.

16. Statutes define “court” differently depending on the context of the statute. *See, e.g.*, Oklahoma Banking Code, OKLA. STAT. tit. 6, § 103(E) (1981) (“‘Court’ means a court of competent jurisdiction.”); Care and Custody of Children, *id.* tit. 10, § 25 (“‘Court’ means any court of competent jurisdiction within any counties that have a special court, the district court or judge of the district court or any special court which may hereafter be established for such purposes authorized to officiate in matters relating to children”); Uniform Reciprocal Enforcement of Support Act, *id.* tit. 12, § 1600.3(a) (“‘Court’ means district court of this state and when the context requires means the court of any other state as defined in a substantially similar reciprocal law.”); Uniform Arbitration Act, *id.* tit. 15, § 802(B) (“The term ‘court’ as used in this act means any court of competent jurisdiction of this state.”); Uniform Partnership Act, *id.* tit. 54, § 202 (“In this act, ‘Court’ includes every court and judge having jurisdiction in this case.”); Uniform Gifts to Minors Act, *id.* tit. 60, § 401(d) (“‘Court’ means the district or superior court . . . for the county in which the minor resides”); Workmen’s Compensation, *id.* tit. 85, § 3(2) (“‘Court’ means the Workers’ Compensation Court.”).

17. Court means “persons appointed under law and vested with the power of rendering judgments, issuing writs and hearing appeals.” WEBSTER’S ENCYCLOPEDIA OF DICTIONARIES 944 (1978); *see also* BLACK’S LAW DICTIONARY 318 (5th ed. 1979) (Court, in a legal sense, generally means “[a]n organ of the government, belonging to the judicial department, whose function is the application of the laws to controversies brought before it and the public administration of justice.”).

18. *See* OKLA. STAT. tit. 20, § 1 (1981) (supreme court); *id.* § 30.1 (court of appeals); *id.* § 31 (court of criminal appeals); *id.* § 91 (district courts).

19. *See, e.g.*, Administrative Procedure Act, OKLA. STAT. tit. 75, § 315(1) (1981) (allowing the agency or any party to a proceeding subject to the Act to take depositions in the same manner as in a civil action). Similar procedures are also available in the Workers’ Compensation Court, OKLA. WORK. COMP. CT. R. 2, 8, and before the Oklahoma Human Rights Commission, OKLA. STAT. tit. 25, §§ 1501(6), 1507(a), 1508(b) (1981). *See Adams I*, *supra* note 1, at 187-88.

20. *See, e.g.*, OKLA. STAT. tit. 12, § 482 (1981) (repealed 1982) (concerned the inspection of documents held by adverse party and provided that a party could demand of the adverse party the documents containing “evidence relating to the merits” of the action or defense); *id.* § 483 (re-

ated. The Oklahoma Supreme Court held that information could be discovered as long as it was not privileged and was "reasonably calculated" to lead to the discovery of admissible evidence.²¹ The New Code, more or less, codifies this judicial standard. However, articulation in the New Code is different.

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . . It is not a ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.²²

Under the interpretation of the old discovery statutes, certain information was nondiscoverable²³ including the existence and amount of liability insurance.²⁴ The New Code probably has not altered these judicial limitations on discovery. This conclusion is particularly true regarding efforts aimed at discovering insurance policies. Consistent with the federal rule,²⁵ the drafters of the New Code had originally

pealed 1982) (pertained to adverse parties entitled to copies of writings and provided that either party had to deliver to the other party copies of documents "whereon the action or defense is founded, or which he intends to offer in evidence at the trial"); *id.* § 548 (repealed 1982) (court where action is pending could order party to produce documents "not privileged, which constitute or contain evidence relating to any of the matters within the scope of examination permitted by deposition and which are in such parties' possession, custody or control").

21. *Stone v. Coleman*, 557 P.2d 904, 905-06 (Okla. 1976) ("Discovery statutes requiring matters subject to discovery to be 'relevant' mean those materials either (1) admissible as evidence or (2) which might lead to the disclosure of admissible evidence."); *Unit Rig & Equip. Co. v. East*, 514 P.2d 396, 397 (Okla. 1973) (holding that questions put to a doctor during discovery were permissible, as long as they did not require the doctor to violate his doctor-patient relationship, because the questions "could lead to the disclosure of admissible evidence or could furnish a basis for impeachment of the doctor's testimony"); *Carman v. Fishel*, 418 P.2d 963, 973-74 (Okla. 1966) ("Does the material, in order to be 'relevant' and subject to discovery, have to be 'admissible' as evidence? We think not."); *State ex rel. Westerheide v. Shilling*, 190 Okla. 305, 306-07, 123 P.2d 674, 678-79 (1942); *see Adams I, supra* note 1, at 189-90.

22. Oklahoma Discovery Code, ch. 198, § 3(B)(1), 1982 Okla. Sess. Law Serv. 422, 422-23 (West) (to be codified at OKLA. STAT. tit. 12, § 3203(B)(1)). This provision is the same as FED. R. Civ. P. 26(b)(1).

23. *See, e.g., Cox v. Theus*, 569 P.2d 447, 450 (Okla. 1977) (holding that party's financial worth is not subject to discovery as relevant to an allegation of punitive damages until prima facie showing of entitlement to punitive damages has been made).

24. *Carman v. Fishel*, 418 P.2d 963 (Okla. 1966). The court held that automobile liability insurance, which was not itself admissible in evidence and was not shown to lead to other evidence which would be admissible, was not discoverable even though it would facilitate the settlement of a case. *Id.* at 974-75. The court did, however, recognize that in certain circumstances, such as where the insurance policy might be relevant in proving ownership of an automobile, discovery of the policy could be compelled. *Id.* at 973 (dictum); *see Adams I, supra* note 1, at 190; *see also Carman*, 418 P.2d at 975-76 (Hodges, J., dissenting) (arguing that existence of liability insurance was relevant because discovery would allow the injured party to avoid useless expenditure of effort and money to recover an uncollectable judgment).

25. FED. R. Civ. P. 26(b)(2) provides that a party may discover the existence and contents of

specifically provided for the discovery of insurance policies.²⁶ The insurance provision, however, was stricken from the bill prior to passage.²⁷ It appears from the legislative history of the New Code that striking of the insurance provision was essential to its passage.²⁸

IV. DEFENSES TO DISCOVERY

The New Code does not provide any new defenses to discovery. As noted earlier, the scope of discovery is, more or less, the same. Aside from objecting to discovery of information outside the permissible scope, the main defenses under the New Code are the privileges.²⁹ The privileges, which have not been enlarged by the New Code, include "self-incrimination,"³⁰ "attorney-client,"³¹ "physician and

any insurance agreements which may be available to satisfy a judgment. The Advisory Committee reasoned that such information enables opposing parties to realistically assess their positions, thus encouraging settlement and avoiding lengthy litigation. FED. R. CIV. P. 26 advisory committee note on the 1970 amendment.

26. This provision was similar to FED. R. CIV. P. 26(b)(2). See Minnis, *supra* note 1, at 1291 for the text of the Oklahoma provision prior to its amendment.

27. OKLA. HOUSE J. 436-37 (daily ed. Mar. 8, 1982); Minnis, *supra* note 1, at 1291.

28. Once the bill was amended by deleting the provision regarding discovery of insurance agreements, the House unanimously consented to consider the bill engrossed and placed it on Third Reading and Final Passage. OKLA. HOUSE J. 436-37 (daily ed. Mar. 8, 1982); Minnis, *supra* note 1, at 1291.

When these sections were deleted, however, the legislature neglected to amend other references in the New Code to the deleted sections. As a result, the following minor amendments are needed to correct this problem: First, § 3(B)(2), line 2 should be amended by changing the number "4" to a "3" so as to read "paragraph 3 of this section"; second, § 3(B)(3)(c)(1), line 3 should be amended by changing the number "4" to a "3" so as to read "under subsection B, paragraph 3, subparagraph a"; finally, § 3(B)(3)(c)(2), line 3 should be amended by changing the number "4" to a "3" so as to read "graph 3, subparagraph b of this section."

29. See Oklahoma Evidence Code, OKLA. STAT. tit. 12, §§ 2501-2513 (1981).

30. U.S. CONST. amend. V; OKLA. CONST. art. II, §§ 21, 27; see Adams I, *supra* note 1, at 191-92.

31. OKLA. STAT. tit. 12, § 2502 (1981); see Adams I, *supra* note 1, at 192-93. Section 2502(B) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

1. Between himself or his representative and his attorney or his attorney's representative;
2. Between his attorney and the attorney's representative;
3. By him or his representative or his attorney or a representative of the attorney to an attorney or a representative of an attorney representing another party in a pending action and concerning a matter of common interest therein;
4. Between representatives of the client or between the client and a representative of the client; or
5. Among attorneys and their representatives representing the same client.

OKLA. STAT. tit. 12, § 2502(B) (1981). There is no privilege under this statute if the attorney's services were sought to aid in the commission of a crime, if the communication is relevant to an issue between parties who claim through the same deceased client, if the communication is relevant to an issue of breach of duty by the attorney to his client or by the client to the attorney, if the

psychotherapist-patient,"³² "husband-wife,"³³ "religious,"³⁴ and "newsman's"³⁵ privileges.

The New Code does not expand these privileges, but it does significantly affect the work product doctrine. Work product now includes not only material prepared by an attorney, but also that prepared by a "representative" of a party.³⁶ Further, prior statements are more easily obtainable by the publisher. A party is no longer required to show "good cause"³⁷ and a witness now has a right to obtain a copy of his

communication is relevant to an issue concerning an attested document to which the attorney is an attesting witness, if the communication is relevant to a matter of common interest between two clients of an attorney retained in common, or if the communication is between a public officer or agency and its attorney, unless the communication concerns a pending investigation. *Id.* § 2502(D); see *Adams I*, *supra* note 1, at 192-93.

32. OKLA. STAT. tit. 12, § 2503(B) (1981) provides that a patient has a privilege to refuse to disclose, or to prevent any other persons from disclosing, confidential communications made between himself, his physician or psychotherapist, and others participating in his diagnosis or treatment. Communications relevant to proceedings to hospitalize the patient for mental illness, communications made during a court ordered examination of the physical, mental, or emotional condition of a patient if they relate to the particular purpose for which the examination is ordered, and communications relevant to the physical, mental, or emotional condition of the patient in a proceeding in which the patient relies on the condition as an element of his claim or defense are excepted from this privilege. *Id.* § 2503(D); see *Adams I*, *supra* note 1, at 200-01.

33. OKLA. STAT. tit. 12, § 2504(A) (1981) provides that a communication between spouses is confidential if it is made privately and is not intended to be disclosed to any others. A defendant may invoke this privilege to prevent his spouse from testifying to any confidential matters in a criminal proceeding. *Id.* § 2504(B). The privilege does not apply when the defendant is charged with a crime against the spouse, a child of either spouse, a person living in the home of either spouse, or a third person when the crime against the third person is committed in the course of a crime against any of the previous three persons. *Id.* § 2504(D).

34. *Id.* § 2505 provides a privilege for confidential communications made to a clergyman acting in his professional capacity.

35. *Id.* § 2506 provides a limited privilege from disclosure of a newsman's source. See also *Adams I*, *supra* note 1, at 202 (discussion of miscellaneous privileges).

36. Oklahoma Discovery Code, ch. 198, § 3(B)(2), 1982 Okla. Sess. Law Serv. 422, 423 (West) (to be codified at OKLA. STAT. tit. 12, § 3203(B)(2)). "Representative" includes a party's "attorney, consultant, surety, [or] indemnitor." *Id.* This provision is similar to FED. R. CIV. P. 26(b)(3), with one significant difference. The federal rule includes a party's "insurer or agent" in its list of representatives. *Id.* "Insurer or agent" was included in the original version of the New Code but was specifically excised by amendment at the same time the provision allowing for the discovery of insurance agreements was deleted. See OKLA. HOUSE J. 436 (daily ed. Mar. 8, 1982); Minnis, *supra* note 1, at 1291.

Prior to the enactment of the New Code, the work product of an attorney was protected by OKLA. DIST. CT. R. 14 which provides that "material which contains or discloses the theories, mental impressions, or litigation plans of a party's attorney may not be disclosed through any discovery procedure" (emphasis added). The New Code provides that when ordering disclosure of work product, the court "shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." Oklahoma Discovery Code, ch. 198, § 3(B)(2), 1982 Okla. Sess. Law Serv. 422, 423 (West) (to be codified at OKLA. STAT. tit. 12, § 3203(B)(2)) (emphasis added). See FED. R. CIV. P. 26(b)(3) which also protects a party's representative as well as his attorney. See generally *Adams I*, *supra* note 1, at 193-97 (discussing work product of attorneys).

37. Oklahoma Discovery Code, ch. 198, § 3(B)(2), 1982 Okla. Sess. Law Serv. 422, 423

own prior statements.³⁸ Work product can now be discovered upon a proper showing "[t]hat the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means."³⁹ However, the forced disclosure of work product is subject to protective orders,⁴⁰ including a requirement that when the information sought is the work product of an expert, the party seeking the discovery must, unless such a requirement would result in manifest injustice, pay the costs reasonably incurred in securing the work product.⁴¹

(West) (to be codified at OKLA. STAT. tit. 12, § 3203(B)(2)) provides that, "A party may obtain, without the required showing [of good cause] provided for in this paragraph, a statement concerning the action or its subject matter previously made by that party." This provision is the same as that in FED. R. CIV. P. 26(b)(3). Prior to the enactment of the New Code, the Oklahoma Supreme Court required a showing of "good cause" before a party could obtain a copy of his own prior statement. *Carman v. Fishel*, 418 P.2d 963, 970-73 (Okla. 1966).

A "statement previously made" is defined as a person's written statement or a "stenographic, mechanical, electrical, or other recording, or a transcription thereof, which substantially recites an oral statement by the person making it and contemporaneously recorded." Oklahoma Discovery Code, ch. 198, § 3(B)(2)(a), (b), 1982 Okla. Sess. Law Serv. 422, 423 (West) (to be codified at OKLA. STAT. tit. 12, § 3203(B)(2)(a), (b)). See FED. R. CIV. P. 26(b)(3)(A), (B).

38. "[A] person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person." Oklahoma Discovery Code, ch. 198, § 3(B)(2), 1982 Okla. Sess. Law Serv. 422, 423 (West) (to be codified at OKLA. STAT. tit. 12, § 3203(B)(2)). See FED. R. CIV. P. 26(b)(3).

39. Oklahoma Discovery Code, ch. 198, § 3(B)(2), 1982 Okla. Sess. Law Serv. 422, 423 (West) (to be codified at OKLA. STAT. tit. 12, § 3203(B)(2)). See FED. R. CIV. P. 26(b)(3).

40. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or on matters relating to a deposition, the district court in the county where the deposition is to be taken may enter any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense

Oklahoma Discovery Code, ch. 198, § 3(C), 1982 Okla. Sess. Law Serv. 422, 424 (West) (to be codified at OKLA. STAT. tit. 12, § 3203(C)). See FED. R. CIV. P. 26(c) which contains the same provision. Section 3(C) should be applicable to discovery of all types of information, including "work product."

There is also language in § 3(B)(2) which requires that the court protect the mental processes of a party's attorney or representative when it allows the discovery of work product. Oklahoma Discovery Code, ch. 198, § 3(B)(2), 1982 Okla. Sess. Law Serv. 422, 423 (West) (to be codified at OKLA. STAT. tit. 12, § 3203(B)(2)). See FED. R. CIV. P. 26(b)(3). See *supra* note 36.

Prior to the enactment of the New Code, OKLA. STAT. tit. 12, § 548 (1981) (repealed 1982), relating to discovery and production of documents, and *id.* § 549(c) (repealed 1982), relating to interrogatories, allowed the court to protect a party or witness from annoyance, embarrassment, or oppression. See *Independent School Dist. No. 40 v. Sarkeys, Inc.*, 569 P.2d 1000, 1002-03 (Okla. 1977).

41. Oklahoma Discovery Code, ch. 198, § 3(B)(3)(c), 1982 Okla. Sess. Law Serv. 422, 424 (West) (to be codified at OKLA. STAT. tit. 12, § 3203(B)(3)(c)). See FED. R. CIV. P. 26(b)(4)(c). Section 3(B)(3) provides an entirely new procedure for the discovery of expert testimony, similar to FED. R. CIV. P. 26(b)(4), although there is some difference. The federal rule allows a party, through the use of interrogatories, to obtain the identity of each witness the other party intends to call as an expert witness at trial, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion. *Id.* 26(b)(4)(A)(i). The New

One significant change effected by the New Code concerns after-acquired knowledge. The district court rules adopted by the Oklahoma Supreme Court provide that a party is not required to supplement his answers to discovery with after-acquired information unless specifically required to do so by the court.⁴² The New Code, which adopts the federal rule,⁴³ requires parties to supplement their responses as to the identity and location of anyone who has knowledge of discoverable matters⁴⁴ and the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.⁴⁵ A party must also amend his response when he learns either that it was incorrect when made⁴⁶ or is now incorrect.⁴⁷ The party must supplement the responses "seasonably" although "seasonably" has not been further defined in this section.⁴⁸

V. USE OF DISCOVERY PRODUCTS OTHER THAN AT TRIAL

A deposition can now be used in any court as long as the party against whom it is being used was present at the taking of the deposi-

Code contains this same provision. Oklahoma Discovery Code, ch. 198, § 3(B)(3)(a)(1), (3), 1982 Okla. Sess. Law Serv. 422, 423 (West) (to be codified at OKLA. STAT. tit. 12, § 3203(B)(3)(a)(1), (3)). The New Code, however, provides an additional tool for the discovery of expert witness testimony not explicitly provided under the federal rules. The New Code expressly allows the party seeking disclosure to depose an expert witness once he is identified through interrogatories. *Id.* § 3(B)(3)(a)(2) (to be codified at OKLA. STAT. tit. 12, § 3203(B)(3)(a)(2)).

Prior to the New Code's enactment, the only provision relating specifically to the discovery of facts and opinions of an adverse party's expert witnesses was OKLA. DIST. CT. R. 14(a) which merely provided that the court could, in its discretion, require the party seeking the information to pay a fair share of the fees and expenses. While the language of rule 14(a) implicitly recognizes the use of depositions and interrogatories to discover the facts or opinions of an expert witness, it does not provide the guidelines found in the New Code regarding what information may be discovered. *See Adams I, supra* note 1, at 197-99.

42. *See* OKLA. DIST. CT. R. 14(b); *Adams I, supra* note 1, at 203-04.

43. FED. R. CIV. P. 26(e).

44. Oklahoma Discovery Code, ch. 198, § 3(E)(1)(a), 1982 Okla. Sess. Law Serv. 422, 424 (West) (to be codified at OKLA. STAT. tit. 12, § 3203(E)(1)(a)).

45. *Id.* § 3(E)(1)(b), 1982 Okla. Sess. Law Serv. at 425 (to be codified at OKLA. STAT. tit. 12, § 3203(E)(1)(b)).

46. *Id.* § 3(E)(2)(a) (to be codified at OKLA. STAT. tit. 12, § 3203(E)(2)(a)).

47. *Id.* § 3(E)(2)(b) (to be codified at OKLA. STAT. tit. 12, § 3203(E)(2)(b)).

48. *Id.* § 3(E)(1), (2), 1982 Okla. Sess. Law Serv. at 424-25 (to be codified at OKLA. STAT. tit. 12, § 3203(E)(1), (2)). "Seasonably" has been defined in the context of the Oklahoma Uniform Commercial Code as an action "taken at or within the time agreed or if no time is agreed at or within a reasonable time." OKLA. STAT. tit. 12A, § 1-204(3) (1981).

The requirement in § 3(E) to supplement discovery responses conflicts with OKLA. DIST. CT. R. 14(a) which provides that there is no duty to supplement responses. In such a situation, rule 14 must give way to the New Code. *See Oklahoma County Sheriff v. Hunter*, 615 P.2d 1007, 1008 (Okla. 1980) ("A Court Rule may not contravene a statute and where the rule and statute are inconsistent, the statute must prevail.").

tion or received the statutory notice.⁴⁹ A deposition may be used to contradict or to impeach the testimony of a deponent as a witness, or for any other purpose allowed by the Oklahoma Evidence Code.⁵⁰ The deposition of a witness, whether the witness is a party or not, may be used for any purpose when (1) the witness is dead, (2) the witness resides outside the county where the action is pending, (3) the witness is unable to attend because of age, illness, infirmity, or imprisonment, (4) a party has been unable to procure the attendance of the deponent by subpoena, (5) the witness is an expert witness, or (6) there are exceptional circumstances.⁵¹ If only a part of the deposition has been introduced by a party, an adverse party may introduce any other part of the deposition as fairness requires.⁵² Once a deposition has been lawfully taken and duly filed in an action, it may be used in any other action involving the same subject matter which is brought between the same parties, their representatives, or their successors in interest.⁵³

The New Code provides substantially the same authority for the wide use of depositions as did the repealed statutes.⁵⁴ The language of

49. Oklahoma Discovery Code, ch. 198, § 9(A), 1982 Okla. Sess. Law Serv. 422, 433 (West) (to be codified at OKLA. STAT. tit. 12, § 3209(A)). Section 9 replaces OKLA. STAT. tit. 12, §§ 433, 444, 447, 448 (1981) (repealed 1982).

50. Oklahoma Discovery Code, ch. 198, § 9(A)(1), 1982 Okla. Sess. Law Serv. 422, 433 (West) (to be codified at OKLA. STAT. tit. 12, § 3209(A)(1)).

51. *Id.* § 9(A)(3) (to be codified at OKLA. STAT. tit. 12, § 3209(A)(3)). Prior to the enactment of the New Code, OKLA. STAT. tit. 12, § 433 (1981) (repealed 1982) allowed the use of the deposition of any witness when (1) the witness resided outside the county where the action was pending, (2) the witness was dead, (3) the witness was unable to attend due to age, infirmity, or imprisonment, (4) the testimony was required upon a motion, or (5) the witness was an expert witness. *See Adams III, supra* note 1, at 226-27.

52. Oklahoma Discovery Code, ch. 198, § 9(A)(4), 1982 Okla. Sess. Law Serv. 422, 433 (West) (to be codified at OKLA. STAT. tit. 12, § 3209(A)(4)).

53. *Id.* This provision was previously embodied in OKLA. STAT. tit. 12, § 444 (1981) (repealed 1982). The New Code is broader than § 444, however, because § 9(A)(4) allows the use of the deposition when the new action is between the same parties, their representatives, or their successors in interest while § 444 allowed the use of the deposition only when the new action was between the same parties.

54. The New Code specifically allows the use of depositions at "the hearing of a motion or an interlocutory proceeding." Oklahoma Discovery Code, ch. 198, § 9(A), 1982 Okla. Sess. Law Serv. 422, 433 (West) (to be codified at OKLA. STAT. tit. 12, § 3209(A)). Section 10 of the New Code, concerning interrogatories, provides that the answers may be used "to the extent permitted by the Oklahoma Evidence Code." *Id.* § 10(B), 1982 Okla. Sess. Law Serv. at 435 (to be codified at OKLA. STAT. tit. 12, § 3210(B)). Section 13 of the New Code, regarding requests for admissions, specifies that the admission may be used for the purpose of the pending action but may not be used against the person making the admission in any other proceeding. *Id.* § 13(C), 1982 Okla. Sess. Law Serv. at 438 (to be codified at OKLA. STAT. tit. 12, § 3213(C)).

OKLA. DIST. CT. R. 13(a) provides that depositions, answers to interrogatories, and demands to admit may be used to support a motion for summary judgment. It does not appear that there is anything in the New Code which would conflict with the uses allowed by rule 13(a).

Prior to the New Code, OKLA. STAT. tit. 12, § 444 (1981) (repealed 1982) allowed the use of a

the New Code is similar to that of its counterpart in the federal rules,⁵⁵ except that under the New Code, an expert witness does not have to be beyond the trial court's subpoena powers before the expert's deposition can be used.⁵⁶

VI. SIGNING OF DISCOVERY REQUESTS, RESPONSES, AND OBJECTIONS

The New Code requires that every request for discovery and every response and objection to a request for discovery, made by a party who is represented by an attorney, must be signed by that attorney in his individual name.⁵⁷ If the party is not represented by an attorney, he must sign the item himself. When the attorney or the party signs the request, response, or objection, he certifies that he has read the request and that it is (1) to the best of his knowledge, consistent with the New Code and warranted by existing law or a good faith argument for changing or reversing existing law, (2) interposed in good faith and not primarily to cause delay, and (3) not unreasonable or unduly burdensome.⁵⁸ The request, response, or objection is not valid unless signed accordingly.⁵⁹

If the certification violates any of the above requirements, the court may, either on a motion or on its own initiative, impose sanctions upon the attorney, the party, or both. These sanctions may include ordering the payment, including attorney's fees, of the expense caused by the violation.⁶⁰ This new requirement⁶¹ is obviously an attempt to minimize the abuse of the discovery process.⁶²

deposition "in any stage of the same action or proceeding." See generally Adams I, *supra* note 1, at 204-06 (discussing the use of discovery products other than at trial).

55. FED. R. CIV. P. 32.

56. Oklahoma Discovery Code, ch. 198, § 9(A)(3)(e), 1982 Okla. Sess. Law Serv. 422, 433 (West) (to be codified at OKLA. STAT. tit. 12, § 3209(A)(3)(e)) allows the deposition of a witness to be used for any purpose once the court finds that the witness is an expert. There is no similar provision in FED. R. CIV. P. 32(a)(3).

57. Oklahoma Discovery Code, ch. 198, § 3(G), 1982 Okla. Sess. Law Serv. 422, 425-26 (West) (to be codified at OKLA. STAT. tit. 12, § 3203(G)).

58. *Id.*

59. *Id.*

60. *Id.*

61. There was no similar requirement that an attorney sign the interrogatories under the old statutes. See OKLA. STAT. tit. 12, § 549 (1981) (repealed 1982). A pleading must be signed by "the party or his attorney." *Id.* § 285. However, the definition of pleading does not include interrogatories. See *id.* §§ 261, 263.

62. This section of the New Code is patterned after an amendment to FED. R. CIV. P. 26 proposed by the Special Committee for the Study of Discovery Abuse of the American Bar Association Section of Litigation. Second Report of the Special Committee for the Study of Discovery

VII. THE ROLE OF TRIAL COURT DISCRETION AND THE EXTENT OF APPELLATE REVIEW OF DISCOVERY ORDERS

The New Code does not change the extent of appellate review of discovery orders. The Oklahoma Supreme Court will undoubtedly remain reluctant to grant interlocutory review of trial court discovery orders.⁶³ The New Code does specifically broaden the discretion allowed a trial court to control and direct discovery.⁶⁴

VIII. DISCOVERY BY DEPOSITION

The New Code makes very few changes in the manner of scheduling or conducting a deposition. However, there are two changes worth noting. First, if the deponent is a party he must supplement his responses.⁶⁵ Second, objections are now reserved without stipulation of the parties.⁶⁶

Prior to the New Code, section 434 of title 12 provided that depositions could be taken immediately after service of summons on a defendant or after ten days following the issuance of summons.⁶⁷ Under the New Code, a plaintiff must wait thirty days "after service . . . upon

Abuse (Nov. 1980), *reprinted in* 92 F.R.D. 137, 140-41 (1982). The Committee believed too much unnecessary discovery was resulting in serious problems of delay, expense, and public resentment. The Committee thought the amendment would remedy the situation, first, by imposing an obligation on the attorney invoking the procedure to use his professional judgment, and second, by permitting a court to strike a request, objection, or response that was not signed in an attempt to circumvent the sanctions imposed on an attorney or party who abuses discovery. *Id.*, *reprinted in* 92 F.R.D. at 141-43.

The Committee stated that the proposed amendment was modeled after FED. R. CIV. P. 11 which deals with the signing of pleadings. Second Report of the Special Committee for the Study of Discovery Abuse (Nov. 1980), *reprinted in* 92 F.R.D. 137, 142. The amendment has not yet been adopted into the federal rules.

63. See Adams I, *supra* note 1, at 206-07 (discussing the role of trial court discretion and the extent of appellate review of discovery orders).

64. See, e.g., Oklahoma Discovery Code, ch. 198, § 9(A)(3)(f), 1982 Okla. Sess. Law Serv. 422, 433 (West) (to be codified at OKLA. STAT. tit. 12, § 3209(A)(3)(f)) (granting court discretion to allow use of depositions in the interest of justice in exceptional circumstances in addition to the specifically delineated circumstances in § 9(A)(3)(a)-(e)). OKLA. STAT. tit. 12, § 433 (1981) (repealed 1982), which embodied most of the provisions of § 9(A)(3) of the New Code, did not contain a provision like § 9(A)(3)(f).

65. Oklahoma Discovery Code, ch. 198, § 3(E), 1982 Okla. Sess. Law Serv. 422, 424-25 (West) (to be codified at OKLA. STAT. tit. 12, § 3203(E)); see *supra* notes 42-48 and accompanying text.

66. OKLA. STAT. tit. 12, § 451 (1981) (repealed 1982) provided that unless the parties stipulated otherwise, no objection to deposition questions was preserved unless raised at the deposition. See *infra* notes 106-08 and accompanying text; Adams III, *supra* note 1, at 217.

67. OKLA. STAT. tit. 12, § 434 (1981) (repealed 1982); see Adams III, *supra* note 1, at 185-86.

any defendant.”⁶⁸ Leave of court can, however, shorten this time.⁶⁹ In response to an opinion limiting the use of depositions,⁷⁰ section 434 was amended to specifically state that “a challenge to the validity of service, the jurisdiction of the court, the venue of the action, or a *demurrer to the sufficiency of the petition* shall not prevent” the taking of a deposition.⁷¹ This language does not appear in the New Code. The provision in the New Code allowing the court to issue a protective order as justice may require, including an order that discovery not be had when action is pending on matters relating to a deposition,⁷² should return to the trial court the discretion to limit discovery pending resolution of pre-

68. Oklahoma Discovery Code, ch. 198, § 7(A), 1982 Okla. Sess. Law Serv. 422, 428 (West) (to be codified at OKLA. STAT. tit. 12, § 3207(A)). See FED. R. CIV. P. 30(a).

69. See Oklahoma Discovery Code, ch. 198, § 7(A), 1982 Okla. Sess. Law Serv. 422, 428 (West) (to be codified at OKLA. STAT. tit. 12, § 3207(A)). The plaintiff may, however, take depositions prior to the expiration of 30 days without leave of the court if the defendant has served notice of taking depositions or otherwise sought discovery, *id.* § 7(A)(1) (to be codified at OKLA. STAT. tit. 12, § 3207(A)(1)), or the plaintiff gives “special notice . . . as provided in subsection B, paragraph 2 of [§ 7],” *id.* § 7(A)(2) (to be codified at OKLA. STAT. tit. 12, § 3207(A)(2)).

This reference in § 7(A)(2) to the giving of special notice as provided in § 7(B)(2) is an apparent mistake in drafting. Subsection B of § 7 concerns the places where a witness or party is required to attend the taking of a deposition. Section 7(B)(2) provides, “A party, in addition to the places where a witness may be deposed, may be deposed in the county where the action is pending or the county where he is located when the notice is served upon him.” *Id.* § 7(B)(2) (to be codified at OKLA. STAT. tit. 12, § 3207(B)(2)). Section 7(B)(2) does not provide for the giving of any special notice.

It is more probable that the legislature intended in drafting § 7(A)(2) to make reference to the special notice as provided by paragraph 2 of subsection C of § 7 which provides,

Leave of court is not required for the taking of a deposition by plaintiff if the notice states that the person to be examined is about to leave the state and will be unavailable for examination, unless his deposition is taken before expiration of the thirty-day period, and sets forth facts to support the statement. The attorney for the plaintiff shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information and belief the statement and supporting facts are true. For a willful violation of this section, an attorney may be subject to appropriate disciplinary action and sanctions under Section 14 of the Discovery Code.

Id. § 7(C)(2), 1982 Okla. Sess. Law Serv. at 429 (to be codified at OKLA. STAT. tit. 12, § 3207(C)(2)). Section 7(A)(2) of the New Code should properly read, “If special notice is given as provided in subsection C, paragraph 2 of this section.”

This correction would make § 7(A)(2) consistent with the wording of FED. R. CIV. P. 30(a) which provides that the plaintiff need not seek leave of the court to take deposition prior to the expiration of 30 days “if special notice is given as provided in subdivision (b)(2) of this rule.” FED. R. CIV. P. 30(b)(2) deals with a situation where the person to be deposed is about to leave the jurisdiction of the court.

70. See *Holt v. Jones*, 252 P.2d 460, 464 (Okla. 1962), where the court held that when the plaintiff fails to state a cause of action in his pleading, he is not a “party” and, therefore, is not entitled to take depositions.

71. OKLA. STAT. tit. 12, § 434 (1981) (repealed 1982) (emphasis added); see Adams III, *supra* note 1, at 185.

72. Oklahoma Discovery Code, ch. 198, § 3(C), 1982 Okla. Sess. Law Serv. 422, 424 (West) (to be codified at OKLA. STAT. tit. 12, § 3203(C)). This is the same as the provision contained in FED. R. CIV. P. 26(c).

liminary matters that may have been taken away by section 434.⁷³

A. *Arranging the Deposition*

A deposition is scheduled either by agreement of the parties or by notice. Even if the deposition is scheduled by agreement, however, the party calling the deposition should always give notice to all parties consistent with the statutory requirements.⁷⁴

Giving proper notice is the quintessential requirement for the later use of depositions. If a party should fail to give proper notice of a deposition, one might argue the deposition could still be conducted for the limited purpose of acquiring information. Among the problems with this argument is that it is an abuse of civil procedure. The deponent might have standing to argue that he should not be required to go forward with the deposition when the notice is improper. Thus, the deponent might later be required to attend another deposition scheduled by those parties who had not received notice, resulting in a dual appearance which, arguably, would impose an "undue burden or expense" on the deponent.

Under section 439 of title 12, the only information required to be included in the notice was the name of the action, the name of the court in which the deposition was to be used, and the time and place the deposition was to be taken.⁷⁵

Such limited notice could lead to discovery by surprise and preclude a party from properly preparing to depose a specific individual.⁷⁶ The New Code requires that the notice given to every other party to the

73. See *Independent School Dist. No. 40 v. Sarkeys, Inc.*, 569 P.2d 1000 (Okla. 1977). The Oklahoma Supreme Court refused to allow the district court to stay discovery procedures pending the resolution of a challenge to the plaintiff's standing to maintain the action. *Id.* at 1003-04.

74. See Oklahoma Discovery Code, ch. 198, § 7(C), 1982 Okla. Sess. Law Serv. 422, 429 (West) (to be codified at OKLA. STAT. tit. 12, § 3207(C)).

75. OKLA. STAT. tit. 12, § 439 (1981) (repealed 1982). *Id.* § 440 (repealed 1982) provided for notice by registered mail to a party who was absent from or was not a resident of Oklahoma. The repealed statutes also provided a method to compel a party to attend a deposition without issuance of a subpoena duces tecum. *Id.* § 390.1 (repealed 1982). This was in contrast to the purpose behind § 439, which was merely to notify all parties to an action of the taking of a deposition from any witness. Adams III, *supra* note 1, at 194 n.93.

Section 390.1 provided that a party from whom a deposition was sought be given three days notice. OKLA. STAT. tit. 12, § 390.1(A) (1981) (repealed 1982). This notice had to state the time and place for taking the deposition, the name and address of the person to be examined, and a designation of any materials which the party was to bring with him. *Id.* § 390.1(B) (repealed 1982).

76. See Adams III, *supra* note 1, at 193. Without notice of who is to be deposed, a party will not know who the witness is and will not be able to prepare, nor will the party be able to decide whether it is necessary for him to attend the deposition of that particular witness.

action contain the time and place for the taking of the deposition as was formerly required by section 439.⁷⁷ Additionally, the notice must contain "the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs."⁷⁸ The one day time period which was allowed for preparation in the old statute⁷⁹ is extended to three days in the New Code.⁸⁰

B. *Requiring Attendance of the Deponent*

Even if the deponent has agreed to testify at a deposition, he should be timely served with a subpoena. If the deponent is a party, no subpoena is necessary. A party who is to be the deponent is required under the New Code to attend upon receiving proper notice.⁸¹ How-

77. Oklahoma Discovery Code, ch. 198, § 7(C)(1), 1982 Okla. Sess. Law Serv. 422, 428 (West) (to be codified at OKLA. STAT. tit. 12, § 3207(C)(1)).

78. *Id.* Section 7(C)(1) requires the same information in the notice as required by FED. R. Civ. P. 30(b)(1).

Section 15 of the New Code provides for a method of service of the notice of discovery. Notice to a party who is represented by an attorney must be served on the attorney unless ordered otherwise by the court. If the attorney cannot be served as provided in § 15, the party is to be served. If neither the attorney nor the party can be served, and no address is known or can be discovered with due diligence, the party may be served by leaving the notice with the court clerk. Oklahoma Discovery Code, ch. 198, § 15(B), 1982 Okla. Sess. Law Serv. 422, 441 (West) (to be codified at OKLA. STAT. tit. 12, § 3215(B)).

Service is accomplished by delivering a copy to the party, attorney, or other person or mailing it to his last known address. Section 15(B) defines delivery of a copy as (1) handing a copy to the party or attorney, (2) leaving it at his office with a clerk or person in charge, or (3) leaving it at his dwelling or usual place of abode with a person of suitable age who also lives there. Section 15(B) further provides that service by mail is completed when the notice is mailed with proper postage affixed. *Id.* This method of service is required for all motions, notice, or other papers unless the New Code requires otherwise. *Id.* § 15(A) (to be codified at OKLA. STAT. tit. 12, § 3215(A)).

79. OKLA. STAT. tit. 12, § 439 (1981) (repealed 1982).

80. Oklahoma Discovery Code, ch. 198, § 7(C)(1), 1982 Okla. Sess. Law Serv. 422, 429 (West) (to be codified at OKLA. STAT. tit. 12, § 3207(C)(1)). There is no similar three day requirement in FED. R. Civ. P. 30(b)(1), the federal counterpart to § 7(C)(1). FED. R. Civ. P. 30(b)(1) merely requires every other party to the action be given "reasonable notice."

81. Section 7(C) of the New Code requires that notice be given to a party to be deposed. Oklahoma Discovery Code, ch. 198, § 7(C)(1), 1982 Okla. Sess. Law Serv. 422, 429 (West) (to be codified at OKLA. STAT. tit. 12, § 3207(C)(1)). Once a party has been served with notice, the sanctions provided in § 14(E) against a party who fails to appear at a deposition become applicable. There is no requirement in § 14(E) that the party be subpoenaed before the sanctions are applicable. *Id.* § 14(E), 1982 Okla. Sess. Law Serv. at 440-41 (to be codified at OKLA. STAT. tit. 12, § 3214(E)); *see infra* note 83. See also *Bourne, Inc. v. Romero*, 23 F.R.D. 292 (E.D. La. 1959), where the court stated that it was not necessary to subpoena a party in order to take his deposition. *Id.* at 295. The court used the above reasoning to reach this conclusion, relying on FED. R. Civ. P. 30(a) and 37(d), the federal counterparts of § 7(G) and § 14(E). *See id.*

Prior to the New Code, OKLA. STAT. tit. 12, § 390.1 (1981) (repealed 1982) was available to compel the attendance of a party at a deposition without issuance of a subpoena. *See Adams III, supra* note 1, at 190-92.

ever, the failure of a party to appear pursuant to notice does not give rise to the contempt proceedings attendant to the failure of a witness to obey a subpoena.⁸² The sanctions against a party for not attending his own properly-noticed deposition are set forth in section 14(E) of the New Code.⁸³

C. *Person Before Whom the Deposition Is Taken*

The repealed statutes specifically delineated the individuals (judge, clerk of a court of record, county clerk, justice of the peace, notary public, master commissioner, or mayor or chief magistrate of an out of state town)⁸⁴ before whom depositions could proceed. Also included was "any person empowered by a special commission."⁸⁵ The New Code merely requires that "depositions shall be taken before an officer authorized to administer oaths by the laws of the place where the examination is held, or before a person appointed by the court in which the action is pending."⁸⁶ Moreover, the old statutes required

82. Section 14(E) of the New Code, which allows sanctions against a party who fails to appear at a deposition after notice, does not provide that such failure to appear is contempt of court. The party seeking the deposition must first obtain a court order, pursuant to § 14(A), requiring the recalcitrant party to attend. Once this order has been obtained against the party to be deposed, any further failure to appear may be considered contempt of court pursuant to § 14(B). See Oklahoma Discovery Code, ch. 198, § 14(A), (B), (E), 1982 Okla. Sess. Law Serv. 422, 439-40 (West) (to be codified at OKLA. STAT. tit. 12, § 3214(A), (B), (E)). See generally Krupp, *Rule 37: Sanctions for Discovery Resistance*, 7 LITIGATION, Spring 1981, at 32 (discussing sanctions available under FED. R. CIV. P. 37, the federal counterpart to § 14 of the New Code).

Under the repealed statutes, if the party were served with notice pursuant to § 390.1, a failure to attend could be punished as contempt without first obtaining a court order as must now be done under the New Code. See OKLA. STAT. tit. 12, § 390.1(D) (1981) (repealed 1982).

83. Oklahoma Discovery Code, ch. 198, § 14(E), 1982 Okla. Sess. Law Serv. 422, 440-41 (West) (to be codified at OKLA. STAT. tit. 12, § 3214(E)). Section 14(E) allows the court to use any of the sanctions available in § 14(B)(2)(a)-(c), to make any orders regarding the failure to appear as are just, and to assess reasonable expenses, including attorney's fees, caused by the failure to appear. The sanctions available in § 14(B)(2)(a)-(c) are orders requiring: That the matters and facts sought in the deposition be taken as established for the purposes of the action; that the party failing to appear be precluded from introducing any matters designated in the deposition as evidence at trial to support his claims or defenses; and striking the pleadings, staying further proceedings until the order is obeyed, dismissing the action or proceeding, or rendering a default judgment against the disobedient party. Oklahoma Discovery Code, ch. 198, § 14(B)(2)(a)-(c), 1982 Okla. Sess. Law Serv. 422, 439-40 (West) (to be codified at OKLA. STAT. tit. 12, § 3214(B)(2)(a)-(c)). This provision is the same as the scheme provided in the federal rules. See FED. R. CIV. P. 37(b)(2)(A)-(C), 37(d).

84. OKLA. STAT. tit. 12, §§ 435, 436, 438, 1703.01 (1981) (repealed 1982); see Adams III, *supra* note 1, at 195-96.

85. OKLA. STAT. tit. 12, § 435 (1981) (repealed 1982). The power to grant this special commission was given to Oklahoma judges by *id.* § 438 (repealed 1982). See Adams III, *supra* note 1, at 196.

86. Oklahoma Discovery Code, ch. 198, § 5(A), 1982 Okla. Sess. Law Serv. 422, 427 (West) (to be codified at OKLA. STAT. tit. 12, § 3205(A)). Additionally, § 5(A) allows the parties to desig-

that "depositions taken in this state, to be used therein, be taken by an officer or person whose authority was derived within the state."⁸⁷ No such limitation is set forth in the New Code.

The circumstances under which a deposition officer may be disqualified are also changed. Under the old statutes, the officer could not be a "relative or attorney of either party, or otherwise interested in the event of the action or proceeding."⁸⁸ The disqualification is expanded in the New Code to include an employee of either party, as well as a relative or employee of the attorney or counsel.⁸⁹ Under the New Code, the interest in the cause is narrowed in that it must now be "financial" to merit disqualification.⁹⁰

D. *Place for the Deposition*

The site of a deposition is determined by the place where the deponent may be required to attend. Under the old statutes, a non-party deponent could be required to attend in the county of his residence, a county adjacent to his county of residence, or wherever he was served with a subpoena.⁹¹ The New Code does not change this.⁹² As under the old statutes,⁹³ a party must attend wherever a witness can be deposed and "in the county where the action is pending."⁹⁴ Further, a party deponent is not entitled to the payment or tender of attendance or

nate a deposition officer pursuant to *id.* § 6, 1982 Okla. Sess. Law Serv. at 428 (to be codified at OKLA. STAT. tit. 12, § 3206). See FED. R. CIV. P. 28(a).

87. OKLA. STAT. tit. 12, § 435 (1981) (repealed 1982).

88. *Id.* § 437 (repealed 1982).

89. Oklahoma Discovery Code, ch. 198, § 5(C), 1982 Okla. Sess. Law Serv. 422, 428 (West) (to be codified at OKLA. STAT. tit. 12, § 3205(C)). See FED. R. CIV. P. 28(c).

90. Oklahoma Discovery Code, ch. 198, § 5(C), 1982 Okla. Sess. Law Serv. 422, 428 (West) (to be codified at OKLA. STAT. tit. 12, § 3205(C)). The repealed statutes did not require the interest be financial but merely required that the deposition officer not be "otherwise interested in the event of the action or proceeding." OKLA. STAT. tit. 12, § 437 (1981) (repealed 1982); see Adams III, *supra* note 1, at 196.

91. OKLA. STAT. tit. 12, § 390 (1981); see Adams III, *supra* note 1, at 188 & n.64.

92. Section 7(B)(1) of the New Code, concerning where a non-party witness may be required to attend a deposition, contains the same locations as the old statute. See Oklahoma Discovery Code, ch. 198, § 7(B)(1), 1982 Okla. Sess. Law Serv. 422, 428 (West) (to be codified at OKLA. STAT. tit. 12, § 3207(B)(1)). The New Code did not abolish § 390 because § 390 refers to trials as well as depositions. See OKLA. STAT. tit. 12, § 390 (1981).

93. OKLA. STAT. tit. 12, § 390.1 (1981) (repealed 1982); see Adams III, *supra* note 1, at 191.

94. Oklahoma Discovery Code, ch. 198, § 7(B)(2), 1982 Okla. Sess. Law Serv. 422, 428 (West) (to be codified at OKLA. STAT. tit. 12, § 3207(B)(2)). The federal counterpart to § 7(B), FED. R. CIV. P. 45(d)(2), does not contain the distinction between parties and non-parties found in § 7(B) (§ 7(B)(1) deals with non-party witnesses while § 7(B)(2) addresses party witnesses). Rule 45(d)(2) does, however, distinguish between a resident of the district in which the deposition is to be taken, who may be required to attend only in the county in which he resides, is employed, or transacts his business in person, or at a place the court finds is convenient, and a nonresident of

travel fees.⁹⁵

E. *Recording and Filing of the Deposition*

The New Code requires that the deposition be recorded by "stenographic means" unless the parties stipulate otherwise in writing or the court, upon a motion, issues such an order.⁹⁶ Under the old statutes, the testimony was to be "fully transcribed" although the court could, upon motion, allow a deposition to "be recorded by audiovisual means."⁹⁷ Like the old statute, the New Code requires the deposition

the district who may be required to attend only in the county in which he is served with the subpoena, within 40 miles from the place of service, or at a place the court finds is convenient.

The New Code also provides for the taking of depositions by telephone, a situation the old statutes did not address. A deposition may be taken by telephone if the parties so stipulate or the court so orders upon a motion. Oklahoma Discovery Code, ch. 198, § 7(C)(7), 1982 Okla. Sess. Law Serv. 422, 430 (West) (to be codified at OKLA. STAT. tit. 12, § 3207(C)(7)). When a deposition is taken by telephone, the "place" the deposition is taken is the location of the deponent answering questions. *Id.* See FED. R. CIV. P. 30(b)(7). The place of the deposition is an important concern in a telephone deposition because § 7(B) limits the places where a witness may be required to attend a deposition, and § 14(A)(1) and § 14(B)(1) allow a court in the county where the deposition is being taken to compel discovery or impose sanctions for failure to comply with a discovery order. See Oklahoma Discovery Code, ch. 198, §§ 7(B), 14(A)(1), (B)(1), 1982 Okla. Sess. Law Serv. 422, 428, 439 (West) (to be codified at OKLA. STAT. tit. 12, §§ 3207(B), 3214(A)(1), (B)(1)). See generally Wachs, *Is Ordeal by Discovery Over? Discovery by Telephone and Conference: New Pretrial Techniques Considered for the District Courts Adopted by the United States Customs Courts*, 13 J. MAR. L. REV. 225, 225-34 (1980) (discussing use of depositions by telephone under U.S. Customs Courts rules).

95. Oklahoma Discovery Code, ch. 198, § 7(I)(2), 1982 Okla. Sess. Law Serv. 422, 432 (West) (to be codified at OKLA. STAT. tit. 12, § 3207(I)(2)). This is the same as was provided under the old statutes. See OKLA. STAT. tit. 12, § 390.1 (1981) (repealed 1982); Adams III, *supra* note 1, at 191-92.

Under the New Code, however, if the requirement that the party deponent pay all his own expenses is unduly burdensome or expensive to the deponent, he may apply for a protective order. See Oklahoma Discovery Code, ch. 198, § 3(C), 1982 Okla. Sess. Law Serv. 422, 424 (West) (to be codified at OKLA. STAT. tit. 12, § 3203(C)). The provision for a protective order in § 3(C) is similar to that contained in FED. R. CIV. P. 26(c). See Adams III, *supra* note 1, at 192 & n.78.

96. Oklahoma Discovery Code, ch. 198, § 7(C)(4), 1982 Okla. Sess. Law Serv. 422, 429 (West) (to be codified at OKLA. STAT. tit. 12, § 3207(C)(4)). See FED. R. CIV. P. 30.

97. OKLA. STAT. tit. 12, § 441 (1981) (repealed 1982). The change allowing the parties to stipulate to non-stenographic means under the New Code parallels the change made by the 1980 amendments to the federal rules. Prior to the 1980 amendment, rule 30(b)(4), like § 441, allowed recording by other than stenographic means only upon court order. See FED. R. CIV. P. 30(b)(4), 28 U.S.C.A. 240 (West 1972) for the text of rule 30(b)(4) prior to the 1980 amendment.

The Advisory Committee stated that the purpose of the amendment was to encourage parties to agree to use electronic recording in order to resolve conflicting claims as to whether electronic recording will reduce the cost of depositions. FED. R. CIV. P. 30 advisory committee note on the 1980 amendment; see *Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 522 (D.C. Cir. 1975) (purpose of allowing non-stenographic recording of deposition is to reduce cost); *Champagne v. Hygrade Food Products, Inc.*, 79 F.R.D. 671, 673 (E.D. Wash. 1978) (purpose of allowing non-stenographic recording of depositions is to reduce cost of pre-trial discovery whenever it can be done without losing accuracy); cf. Adams III, *supra* note 1, at 183 (major disadvantage of using depositions is the cost). The Committee further noted that the provision requiring the stipulation or order to name the person before whom the deposition is to be taken was added to encourage the naming of

officer to seal the deposition.⁹⁸ However, the New Code dispenses with the requirement that the deposition “remain under seal until opened by the clerk by order of the court, or at the request of a party to the action or proceeding, or his attorney.”⁹⁹ Arguably, the absence of this language means that the deposition, once filed, will be treated like any other public record¹⁰⁰ and that any person with a “proper motive,” whether an attorney, a party to the action, or neither, can examine it without a court order. Improvements in technology may have made the requirement for a court order to unseal a deposition unnecessary. One reason for the limit on access to filed depositions was to protect the authenticity of the transcription. The various copying machines and recording devices now available may have made the requirement for an unsealing order unnecessary.

F. *Costs of the Deposition*

Like the old statutes,¹⁰¹ the New Code requires that a party taking a deposition “bear all expenses thereof.”¹⁰² The party taking the deposition is also given the additional duty of giving all other parties

the recording technician as that person, thereby eliminating the necessity of having a person at the deposition whose only function is to administer the oath. FED. R. CIV. P. 30 advisory committee note on the 1980 amendment.

Section 7(C)(4) retains the provision of § 441 regarding accuracy, in that the order or stipulation pursuant to § 7(C)(4) may include provisions to assure the accuracy and trustworthiness of the recording. Oklahoma Discovery Code, ch. 198, § 7(C)(4), 1982 Okla. Sess. Law Serv. 422, 429 (West) (to be codified at OKLA. STAT. tit. 12, § 3207(C)(4)); see OKLA. STAT. tit. 12, § 441 (1981) (repealed 1982); FED. R. CIV. P. 30(b)(4); see also *Barham v. IDM Corp.*, 78 F.R.D. 340, 341 (N.D. Ohio 1978) (better practice is to permit electronic recording of depositions whenever the recording's reliability and trustworthiness can be assured). See generally *Adams III*, *supra* note 1, at 218-19 (discussing the desirability of videotape depositions); *Murray, Videotaped Depositions: Putting Absent Witnesses in Court*, 68 A.B.A. J. 1402 (1982) (discussing procedures for taking videotape depositions); Annot., 16 A.L.R. FED. 969 (1973) (recording of testimony by non-stenographic means under rule 30(b)(4)).

98. Compare Oklahoma Discovery Code, ch. 198, § 7(G)(1), 1982 Okla. Sess. Law Serv. 422, 431 (West) (to be codified at OKLA. STAT. tit. 12, § 3207(G)(1)) (“Unless otherwise ordered by the court, the officer shall securely seal the deposition . . .”) with OKLA. STAT. tit. 12, § 442 (1981) (repealed 1982) (“deposition . . . shall be sealed up”).

99. OKLA. STAT. tit. 12, § 442 (1981) (repealed 1982); *Adams III*, *supra* note 1, at 222. However, one protective order that can be obtained under the New Code, upon a showing of good cause, is that once the deposition is sealed, it can only be opened by court order. See Oklahoma Discovery Code, ch. 198, § 3(C)(5), 1982 Okla. Sess. Law Serv. 422, 424 (West) (to be codified at OKLA. STAT. tit. 12, § 3203(C)(5)).

100. See OKLA. STAT. tit. 51, § 24 (1981).

101. *Id.* tit. 12, § 449 (1981) (repealed 1982).

102. Oklahoma Discovery Code, ch. 198, § 7(G)(2), 1982 Okla. Sess. Law Serv. 422, 431 (West) (to be codified at OKLA. STAT. tit. 12, § 3207(G)(2)). There is no similar provision in the corresponding federal rule. See FED. R. CIV. P. 30(f). But see *Haymes v. Smith*, 73 F.R.D. 572, 574-75 (W.D.N.Y. 1976) (courts can provide for payment of expenses of taking deposition with the general rule being that the burden is on the person taking the deposition).

"prompt notice" of the filing of the deposition.¹⁰³ A part of these expenses is recoverable by a prevailing party and can be taxed as a part of the judgment.¹⁰⁴ However, unlike the old statutes, the transcription cost which can be recovered by the prevailing party is not limited under the New Code to that "which is now or may be hereafter prescribed by law for appellate transcripts."¹⁰⁵ With this limitation removed, a prevailing party may be entitled to out-of-pocket, per-page deposition expenses regardless of the appellate transcript per-page limitation.

G. *Objections to Questions*

Under the old statutes, unless the parties stipulated otherwise, objections had to be made at the time of the taking of the deposition or they would not thereafter be considered.¹⁰⁶ These exceptions were to be decided on motion prior to trial.¹⁰⁷ Attorneys routinely made what court reporters referred to as the "standard stipulation" that all objections were reserved. However, under the New Code, objections to admissibility may be made, at the trial or hearing "for any reason which would require the exclusion of the evidence if the witness were then

103. Oklahoma Discovery Code, ch. 198, § 7(G)(3), 1982 Okla. Sess. Law Serv. 422, 431 (West) (to be codified at OKLA. STAT. tit. 12, § 3207(G)(3)). See FED. R. CIV. P. 30(f)(3).

104. Section 7(J) of the New Code allows the prevailing party to recover the cost of deposition transcription, sheriff's fees for serving notice, and witness fees. Oklahoma Discovery Code, ch. 198, § 7(J), 1982 Okla. Sess. Law Serv. 422, 432 (West) (to be codified at OKLA. STAT. tit. 12, § 3207(J)). The old statute included the same items as costs recoverable upon judgment. See OKLA. STAT. tit. 12, § 449 (1981) (repealed 1982).

The federal rules do not contain a counterpart to § 7(J). However, FED. R. CIV. P. 54 allows the recovery of costs by the prevailing party. Federal law provides for the recovery, as costs, of several items similar to those in § 7(J)—court reporter fees for a stenographic transcript obtained for use in the case, marshal fees, and witness fees. See 28 U.S.C. § 1920 (1976 & Supp. IV 1980); see also *Wehr v. Burroughs Corp.*, 477 F. Supp. 1012, 1022 (E.D. Pa. 1979) (deposition transcripts generally taxable as costs at court's discretion); *Esler v. Safeway Stores, Inc.*, 77 F.R.D. 479, 482 (W.D. Mo. 1978) (28 U.S.C. § 1920(2) allowing recovery, as costs, of "fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case" includes recovery of cost of deposition transcript); *Action Alliance for Senior Citizens of Greater Philadelphia, Inc. v. Shapp*, 74 F.R.D. 617, 619-20 (E.D. Pa. 1977) (rule 54(d) and 28 U.S.C. § 1920(2) allow recovery of cost of deposition transcript); *Frigiquip Corp. v. Parker-Hannifin Corp.*, 75 F.R.D. 605, 615 (W.D. Okla. 1977) (travel expenses of counsel attending deposition generally not taxed as costs). Recovery of deposition costs by the prevailing party should be allowed as long as the taking of the deposition was reasonable. *E.g.*, *Esler*, 77 F.R.D. at 482-83; *Semke v. Enid Automobile Dealers Ass'n*, 52 F.R.D. 518, 520 (W.D. Okla. 1971); see *Ford Motor Credit Co. v. Goings*, 527 P.2d 603, 610 (Okla. App. 1974).

105. OKLA. STAT. tit. 12, § 449 (1981) (repealed 1982); see Oklahoma Discovery Code, ch. 198, § 7(J), 1982 Okla. Sess. Law Serv. 422, 432 (West) (to be codified at OKLA. STAT. tit. 12, § 3207(J)).

106. OKLA. STAT. tit. 12, § 451 (1981) (repealed 1982); see *Adams III*, *supra* note 1, at 217.

107. OKLA. STAT. tit. 12, § 452 (1981) (repealed 1982).

present and testifying.”¹⁰⁸

The old statutes were silent on the resolution of discovery deposition disputes in counties other than where the action was pending. The New Code gives specific authority to a district court to sanction a witness or a party who fails to comply with an order when a deposition is taken in a county other than where the action is pending, although the only sanction authorized is to consider the recalcitrant deponent in contempt.¹⁰⁹ A myriad of sanctions is available to the court where the action is pending.¹¹⁰ Under the old statutes, a witness' refusal to be sworn or to answer “when lawfully ordered” could be punished “as a contempt of the court or officer by whom his attendance or testimony is required.”¹¹¹ Further, a body attachment could be issued for attend-

108. Oklahoma Discovery Code, ch. 198, § 9(B), 1982 Okla. Sess. Law Serv. 422, 433-34 (West) (to be codified at OKLA. STAT. tit. 12, § 3209(B)). This is the same as the provision in FED. R. CIV. P. 32(b). See *Reeg v. Shaughnessy*, 570 F.2d 309, 316-17 (10th Cir. 1978).

There are certain objections which are waived if not timely made. Any objection to the notice for taking depositions is waived unless promptly served upon the party giving the notice. Oklahoma Discovery Code, ch. 198, § 9(C)(1), 1982 Okla. Sess. Law Serv. 422, 434 (West) (to be codified at OKLA. STAT. tit. 12, § 3209(C)(1)). Any objection to the deposition officer's qualification is waived unless made before the beginning of the deposition or as soon afterwards as the disqualification becomes or could have become known. *Id.* § 9(C)(2) (to be codified at OKLA. STAT. tit. 12, § 3209(C)(2)). As to the taking of the deposition itself, any objection to the competency of the witness or the competency, relevancy, or materiality of the testimony which could have been removed if presented and any objection to the manner of examination, in the oath of affirmation, or conduct of the parties is waived unless the objection is raised at the deposition. *Id.* § 9(C)(3)(a), (b) (to be codified at OKLA. STAT. tit. 12, § 3209(C)(3)(a), (b)). Finally, an objection to the manner in which the testimony is transcribed or the manner in which the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise handled by the deposition officer is waived unless a motion to suppress is made with reasonable promptness after the defect is or should have been found. *Id.* § 9(C)(4) (to be codified at OKLA. STAT. tit. 12, § 3209(C)(4)). FED. R. CIV. P. 32(d)(1)-(4) contains the same provisions regarding objections. See *Oberlin v. Marlin Amer. Corp.*, 596 F.2d 1322, 1328 (7th Cir. 1979) (defendant's failure to object at the time of deposition to the use of leading questions during cross-examination of a party by that party's own attorney waived it as a ground for objection at trial); *Oates v. S.J. Groves & Sons Co.*, 248 F.2d 388, 389 (6th Cir. 1957) (appellant's objection to appellee's failure to give notice of filing as required by federal rules was waived by failure to make a motion to suppress).

109. Oklahoma Discovery Code, ch. 198, § 14(B)(1), 1982 Okla. Sess. Law Serv. 422, 439 (West) (to be codified at OKLA. STAT. tit. 12, § 3214(B)(1)). Once the person is considered to be in contempt, the court may apply the sanctions provided in § 394 of title 12 which include a fine, imprisonment until compliance is forthcoming, and liability to the party injured by his action. OKLA. STAT. tit. 12, § 394(A) (1981); see *Adams III*, *supra* note 1, at 188-91.

110. See Oklahoma Discovery Code, ch. 198, § 14(B)(2), 1982 Okla. Sess. Law Serv. 422, 439-40 (West) (to be codified at OKLA. STAT. tit. 12, § 3214(B)(2)). These sanctions include (1) ordering that information and facts sought be considered established in accordance with the claim of the party obtaining the order; (2) prohibiting the disobedient party from introducing any of the information sought into evidence; (3) striking the pleadings, staying further proceedings until the order is obeyed, or rendering a default judgment against the disobedient party; (4) treating the disobedience as contempt of court; (5) ordering the disobedient party to pay the reasonable expenses, including attorney's fees, caused by his disobedience. *Id.* See FED. R. CIV. P. 37(b)(2).

111. OKLA. STAT. tit. 12, § 392 (1981); see *supra* note 109. However, there are limits as to who

ance of a witness who did not appear.¹¹² No attachment provisions are provided in the New Code, but the attachment statute is not repealed.

H. *Interjurisdictional Depositions*

1. Depositions Taken Outside of Oklahoma for Use in Oklahoma Courts

The Oklahoma statutes governing the taking of depositions outside of Oklahoma for use in this state¹¹³ are repealed by the New Code. The New Code procedures, however, are generally consistent with those set out in the repealed statutes.¹¹⁴ As mentioned earlier, the New Code has streamlined the definition of the person before whom a deposition must be taken.¹¹⁵ Finally the power to specially commission a person to preside over a deposition is no longer a prerogative of any Oklahoma court of record. The New Code provides that the court where the action is pending must make the appointment.¹¹⁶

2. Depositions Taken in Oklahoma for Use in Courts Outside of Oklahoma

Although the title of the Uniform Foreign Depositions Act is dropped and two of its three sections are repealed,¹¹⁷ the substantive section of the Act¹¹⁸ is not repealed by the New Code. Further, the

can issue a contempt citation. Only a court vested with judicial power may do so. Adams III, *supra* note 1, at 188-89 & nn.65-67.

112. OKLA. STAT. tit. 12, § 393 (1981).

113. OKLA. STAT. tit. 12, §§ 436, 438, 1703.01 (1981) (repealed 1982). Section 436 set forth the persons authorized to take depositions outside the state. Section 438 authorized any judge of an Oklahoma court to grant commissions to persons to take depositions either within or without the state. Section 1703.01, entitled "Taking of depositions outside state for use in state," set forth the requirements for taking a deposition outside the state, including the notice required, the deposition officer, and manner of taking the deposition. *See generally* Adams III, *supra* note 1, at 197-200 (discussing depositions taken outside Oklahoma for use in Oklahoma courts).

114. *See* Oklahoma Discovery Code, ch. 198, § 5(A), (B), 1982 Okla. Sess. Law Serv. 422, 427-28 (West) (to be codified at OKLA. STAT. tit. 12, § 3205(A), (B)).

115. *See supra* notes 84-90 and accompanying text.

116. OKLA. STAT. tit. 12, § 438 (1981) (repealed 1982) provided that "[a]ny court of record of this state . . . is authorized to grant a commission to take depositions . . . without the state" (emphasis added). The New Code provides that "[w]ithin this state, or any other state . . . of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the place where the examination is held, or before a person appointed by the court in which the action is pending." Oklahoma Discovery Code, ch. 198, § 5(A), 1982 Okla. Sess. Law Serv. 422, 427 (West) (to be codified at OKLA. STAT. tit. 12, § 3205(A)) (emphasis added).

117. OKLA. STAT. tit. 12, §§ 461, 463 (1981), *repealed by* Oklahoma Discovery Code, ch. 198, § 16, 1982 Okla. Sess. Law Serv. 422, 441-42 (West). Section 461 provided for the manner of citation of the Act and § 463 provided for its interpretation and construction.

118. OKLA. STAT. tit. 12, § 462 (1981) provides,

Whenever any mandate, writ or commission is issued out of any court of record in any

Uniform Interstate and International Procedure Act¹¹⁹ is not repealed.

I. *Depositions to Perpetuate Testimony*

The New Code repeals the Uniform Perpetuation of Testimony Act.¹²⁰ The New Code has a section governing the perpetuation of testimony.¹²¹ The proceedings under the New Code, with the exception of notice, are essentially the same.¹²² However, the scope of the power to perpetuate testimony is significantly enlarged. A court is authorized to issue an order for the inspection of documents, things, and an entry upon land for inspection and medical examinations.¹²³ The old statutes' express requirement that the court be satisfied that the petition is not for the purpose of discovery is eliminated in the New Code.¹²⁴ Fi-

other state, territory, district or foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness or witnesses in this state, witnesses may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state.

119. *Id.* § 1703.02. See generally Adams III, *supra* note 1, at 200-03 (discussing depositions taken in Oklahoma for use in courts outside the state).

120. OKLA. STAT. tit. 12, §§ 538.1-13 (1981), *repealed by* Oklahoma Discovery Code, ch. 198, § 16, 1982 Okla. Sess. Law Serv. 422, 441-42 (West).

121. Oklahoma Discovery Code, ch. 198, § 4, 1982 Okla. Sess. Law Serv. 422, 426-27 (West) (to be codified at OKLA. STAT. tit. 12, § 3204).

122. The New Code requires service of notice at least 20 days before the date of the hearing of the petition. Oklahoma Discovery Code, ch. 198, § 4(A)(2), 1982 Okla. Sess. Law Serv. 422, 426 (West) (to be codified at OKLA. STAT. tit. 12, § 3204(A)(2)). Under § 538.2, the notice was the same as that provided for personal service of summons, although the court could shorten the period upon a showing of "extraordinary circumstances." OKLA. STAT. tit. 12, § 538.2 (1981) (repealed 1982); see Adams III, *supra* note 1, at 203-05. Professor Adams compares the Uniform Act with FED. R. CIV. P. 27 which is similar to § 4 of the New Code. Adams III, *supra* note 1, at 203 & n.140. Section 4 does, however, contain three provisions not found in rule 27. Section 4 requires that the deposition be filed with the court where the petition is filed or the motion is made, that a party taking the deposition pay the costs thereof, and that depositions taken under the procedures of another jurisdiction which has similar procedures be admissible in Oklahoma to the same extent as a deposition taken pursuant to § 4. Oklahoma Discovery Code, ch. 198, § 4(D)-(F), 1982 Okla. Sess. Law Serv. 422, 427 (West) (to be codified at OKLA. STAT. tit. 12, § 3204(D)-(F)). These three subsections retain the provisions formerly embodied in OKLA. STAT. tit. 12, §§ 538.8-10 (1981) (repealed 1982).

123. Section 4(A)(3) of the New Code allows a court to enter orders as provided in § 11 and § 12. Oklahoma Discovery Code, ch. 198, § 4(A)(3), 1982 Okla. Sess. Law Serv. 422, 426-27 (West) (to be codified at OKLA. STAT. tit. 12, § 3204(A)(3)). See FED. R. CIV. P. 27(a)(3).

Section 11 provides for the production of documents and things and for the entry upon land for inspection. Oklahoma Discovery Code, ch. 198, § 11, 1982 Okla. Sess. Law Serv. 422, 435-36 (West) (to be codified at OKLA. STAT. tit. 11, § 3211); see *infra* notes 156-66 and accompanying text. Section 12 provides for physical and medical examinations. Oklahoma Discovery Code, ch. 198, § 12, 1982 Okla. Sess. Law Serv. 422, 436-37 (West) (to be codified at OKLA. STAT. tit. 12, § 3212); see *infra* notes 167-77 and accompanying text.

124. OKLA. STAT. tit. 12, § 538.4 (1981) (repealed 1982) required that the judge be satisfied that the petition to perpetuate testimony was not for the purpose of discovery and that it might prevent future delay or failure of justice before ordering the testimony perpetuated. The New Code requires only that the judge be satisfied that the "perpetuation of the testimony may prevent

nally, the New Code attempts to protect those who do not receive personal service by requiring that the court either appoint an attorney to represent them or conduct cross-examination itself.¹²⁵

J. *Depositions upon Written Interrogatories*

"Depositions upon written interrogatories" is a euphemism for submitting interrogatories to nonparties. Interrogatories are only for parties.¹²⁶ Under the repealed statutes, the definition of a deposition included "a written declaration, under oath, made upon notice to the adverse party . . . upon written interrogatories."¹²⁷ As opposed to this oblique reference, the New Code now has a specific section entitled "Depositions Upon Written Questions."¹²⁸ Except for the taxing of costs,¹²⁹ this section of the New Code is virtually identical to its federal rule counterpart.¹³⁰ Unlike interrogatories where the questions and answers are both written, the questions in "depositions upon written questions," though written, are asked and answered orally before an officer who transcribes them. The New Code requires that the officer taking the "deposition" (as with oral depositions) be specifically identified.¹³¹

a failure or delay of justice." Oklahoma Discovery Code, ch. 198, § 4(A)(3), 1982 Okla. Sess. Law Serv. 422, 426-27 (West) (to be codified at OKLA. STAT. tit. 12, § 3204(A)(3)). This requirement in § 4(A)(3) is the same as that in FED. R. CIV. P. 27(a)(3).

125. Oklahoma Discovery Code, ch. 198, § 4(A)(2), 1982 Okla. Sess. Law Serv. 422, 426 (West) (to be codified at OKLA. STAT. tit. 12, § 3204(A)(2)). See FED. R. CIV. P. 27(a)(2). See generally Adams III, *supra* note 1, at 210-11 (discussing the attorney's role in a deposition to perpetuate testimony).

126. Council on Judicial Complaints v. Maley, 607 P.2d 1180, 1182 (Okla. 1980); Oklahoma Discovery Code, ch. 198, § 10(A), 1982 Okla. Sess. Law Serv. 422, 434-35 (West) (to be codified at OKLA. STAT. tit. 12, § 3210(A)); OKLA. STAT. tit. 12, § 549 (1981) (repealed 1982); FED. R. CIV. P. 33(a); Adams II, *supra* note 1, at 662.

127. OKLA. STAT. tit. 12, § 423 (1981) (repealed 1982) (emphasis added); see Marathon Ins. Co. v. Arnold, 433 P.2d 927, 930 (Okla. 1967); Scott v. Vulcan Iron Works Co., 31 Okla. 334, 341, 122 P. 186, 189-90 (1912).

128. Oklahoma Discovery Code, ch. 198, § 8, 1982 Okla. Sess. Law Serv. 422, 432 (West) (to be codified at OKLA. STAT. tit. 12, § 3208).

129. *Id.* § 8(D) (to be codified at OKLA. STAT. tit. 12, § 3208(D)) provides that the cost of transcription, sheriff's fees, and witness fees may be taxed as costs.

130. FED. R. CIV. P. 31.

131. The old statutes did not provide any specific procedures for "depositions upon written interrogatories." The New Code provides a specific procedure for taking depositions upon written questions.

The party desiring to take the deposition of a party or a person by written questions must serve the questions upon every other party along with a notice stating the name and address of the person who is to answer the questions and, if the name is unknown, a description of the person sufficient to identify him, and the name or title and address of the deposition officer. Oklahoma Discovery Code, ch. 198, § 8(A), 1982 Okla. Sess. Law Serv. 422, 432 (West) (to be codified at OKLA. STAT. tit. 12, § 3208(A)). A party may then serve cross questions on all other parties within 30 days after the service of notice and the written questions. A party may, within 10 days of being served with the cross questions, serve redirect questions on all parties. Finally, within 10 days

IX. INTERROGATORIES

A. *Use and Limitations*

The procedures and timing for initiating and responding to interrogatories are altered by the New Code. Under the old statutes, interrogatories could be served at any time after the commencement of the action, except that a plaintiff could not serve interrogatories without leave of the court or notice until after the service of summons.¹³² Further, a party could serve interrogatories only on an adverse party.¹³³ The New Code alters this slightly. Under the New Code, interrogatories may be served on the plaintiff any time after the commencement of the action. Interrogatories may be served on any other party with or after the service of summons.¹³⁴ Unlike the old statute, the New Code allows a party to serve interrogatories on any other party, not merely adverse parties.¹³⁵

after being served with redirect questions, a party may serve all other parties with recross questions. *Id.*

The deposition officer conducts the hearing. The party taking the depositions must deliver a copy of the notice and questions to the officer designated in the notice. The officer then takes the witness' response to the questions and prepares, certifies, and files or mails the deposition in the same manner as would be done with a deposition upon oral examination. *See id.* § 8(B) (to be codified at OKLA. STAT. tit. 12, § 3208(B)). *See generally* Adams III, *supra* note 1, at 205-06 (discussing procedures, advantages, and disadvantages of depositions upon written interrogatories); Schmetz, *Written Depositions under Federal and State Rules as Cost-Effective Discovery at Home and Abroad*, 16 VILL. L. REV. 7 (1970) (discussing procedures and strategic considerations for depositions upon written questions pursuant to FED. R. CIV. P. 31).

132. OKLA. STAT. tit. 12, § 549(a) (1981) (repealed 1982); Adams II, *supra* note 1, at 665.

133. OKLA. STAT. tit. 12, § 549(a) (1981) (repealed 1982).

134. Oklahoma Discovery Code, ch. 198, § 10(A), 1982 Okla. Sess. Law Serv. 422, 434-35 (West) (to be codified at OKLA. STAT. tit. 12, § 3210(A)). This provision is the same as FED. R. CIV. P. 33(a).

This provision in the New Code, concerning the time when depositions may be served, is essentially the same as that in the repealed statute. Both allow the plaintiff to serve interrogatories only after the defendant is served, while the defendant is allowed to serve them on the plaintiff as soon as summons is issued. *See* Dunagan & Ricketts, *An Overview of Pre-Trial Preparation for Business Related Litigation*, 16 TULSA L.J. 139, 166 (1980) (comparing interrogatory practice under state law (OKLA. STAT. tit. 12, § 549 (1981) (repealed 1982)) and federal law (FED. R. CIV. P. 33(a) which is substantially the same as the New Code)).

135. Oklahoma Discovery Code, ch. 198, § 10(A), 1982 Okla. Sess. Law Serv. 422, 434-35 (West) (to be codified at OKLA. STAT. tit. 12, § 3210(A)). The change in the New Code allowing a party to serve any party as opposed to the old statute's restriction allowing a party to serve only an adverse party probably broadens the scope of the statute.

Under the old statute, which was similar to FED. R. CIV. P. 33 prior to its 1970 amendment, it was questionable whether a plaintiff could have served interrogatories against a third party defendant who did not challenge the plaintiff's position. *See, e.g.,* Smigiel v. Compagnie de Transports Oceaniques, 183 F. Supp. 518, 519 (E.D. Pa. 1960) ("[U]nless a third-party defendant *clearly challenges* plaintiff's position, either by pleadings or other evidence in the record, the third-party defendant will not be considered 'adverse' to the plaintiff." (emphasis in original)); Kestner v. Reading Co., 21 F.R.D. 303, 303-04 (E.D. Pa. 1957) (adverse parties does not mean parties who are adverse in interest but rather who are on opposite sides of an issue raised by the pleadings or

The twenty day time period allowed under the old statutes to answer or object is enlarged by the New Code to thirty days.¹³⁶ In addition, a defendant is allowed forty-five days from the service of the summons and complaint upon him to serve his answers or objections to the interrogatories.¹³⁷ The New Code also requires court approval of any stipulation to enlarge these time periods.¹³⁸

Unlike the repealed statutes, the New Code requires that objections to answering interrogatories specify the reason for the objection.¹³⁹ The New Code places the burden of disposing of these

otherwise presented by the record); *see also* *Harris v. Marine Transport Lines, Inc.*, 22 F.R.D. 484, 485 (E.D.N.Y. 1958) (where third party defendant answered plaintiff's complaint and was, therefore, at issue with plaintiff, plaintiff could serve interrogatories on him as an adverse party).

Prior to its amendment in 1970, FED. R. CIV. P. 33, like OKLA. STAT. tit. 12, § 549 (1981) (repealed 1982), allowed a party to serve interrogatories only upon adverse parties. The 1970 amendment deleted the "adverse party" requirement, making the requirement of FED. R. CIV. P. 33 the same as that now found in § 10(A) of the New Code. The Advisory Committee on the Federal Rules noted that courts had generally construed the adverse party requirement as restricting the use of interrogatories to situations where the parties were on opposite sides of an issue, even though they may have conflicting interests. The Advisory Committee believed this resulted in highly technical distinctions, a result not in line with the aims of a liberal and nontechnical discovery scheme. FED. R. CIV. P. 33 advisory committee note on the 1970 amendment.

136. Compare Oklahoma Discovery Code, ch. 198, § 10(A), 1982 Okla. Sess. Law Serv. 422, 434-35 (West) (to be codified at OKLA. STAT. tit. 12, § 3210(A)) ("The party on whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within thirty (30) days after the service of the interrogatories . . .") with OKLA. STAT. tit. 12, § 549(a) (1981) (repealed 1982) ("[T]he party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within a period designated in the interrogatories, which period shall not be less than twenty (20) days after service of the interrogatories."); *see Adams II, supra* note 1, at 666-68 (discussing responding to interrogatories); *Dunagan & Ricketts, supra* note 134, at 166 (comparing response time for interrogatories under federal rules to that under § 549).

137. Oklahoma Discovery Code, ch. 198, § 10A, 1982 Okla. Sess. Law Serv. 422, 434-35 (West) (to be codified at OKLA. STAT. tit. 12, § 3210(A)). This 45 day period from the time summons is served for a defendant to answer or object, and the 30 day general time period to answer are identical to the times allowed in FED. R. CIV. P. 33(a).

138. Section 10(A) provides that the court may allow a response period shorter or longer than the 30 or 45 day period allowed in the statute. There is no provision in § 10(A) comparable to that in OKLA. STAT. tit. 12, § 549(a) (1981) (repealed 1982) which specified that the parties could extend the answer time merely by written stipulation. *See* Oklahoma Discovery Code, ch. 198, § 10(A), 1982 Okla. Sess. Law Serv. 422, 434-35 (West) (to be codified at OKLA. STAT. tit. 12, § 3210(A)).

139. "Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event *the reasons for objection shall be stated in lieu of an answer.*" Oklahoma Discovery Code, ch. 198, § 10(A), 1982 Okla. Sess. Law Serv. 422, 434-35 (West) (to be codified at OKLA. STAT. tit. 12, § 3210(A)) (emphasis added). This same requirement is set forth in FED. R. CIV. P. 33. *See, e.g.,* *Sherman Park Community Ass'n v. Wauwatosa Realty Co.*, 486 F. Supp. 838, 845 (E.D. Wis. 1980) ("The objection must make a specific showing of reasons why the interrogatory must not be answered.") (quoting 4A J. MOORE, J. LUCAS & D. EPSTEIN, *MOORE'S FEDERAL PRACTICE* ¶ 33.20, at 33-106 (2d ed. 1982)); *In re Folding Carton Antitrust Litigation*, 83 F.R.D. 260, 264 (N.D. Ill. 1979) ("Objections to interrogatories must be specific and by [sic] supported by a detailed explanation why the interrogatories are improper. General objections may result in waiver of the objections." (citations omitted)); *United States v. 58.16 Acres of*

objections on the party seeking discovery by requiring that he move to compel answers.¹⁴⁰

B. *Permitted Scope of Interrogatories*

The scope of interrogatories under the old statutes allowed inquiry into matters relevant to the issues in the pending action which were not privileged—the same scope as that for depositions.¹⁴¹ Thus, as explained earlier, the New Code changes the scope of interrogatories very little.¹⁴²

C. *Responding to Interrogatories*

One new aspect of the New Code provides the party answering

Land, 66 F.R.D. 570, 572 (E.D. Ill. 1975) ("Objections to interrogatories must be specific and be supported by a detailed explanation as to why interrogatories or a class of interrogatories is objectionable."); see also FED. R. CIV. P. 33 advisory committee note on the 1970 amendment. The Committee stated that while 1970 amendment to rule 33 has placed the burden on the interrogating party to move forward by moving for a court order to compel answers when objections are made (see *infra* note 140), this does not alter the existing obligation on objecting party to justify objections. See, e.g., *Sherman Park Community Ass'n*, 486 F. Supp. at 845 ("The burden of proof is on the party who raises the objection."); *Acres of Land*, 66 F.R.D. at 572-73 ("The burden is on the objecting party to show why the interrogatory is improper.").

The old statute merely required that the objecting party serve the party submitting the interrogatories with written objections to the interrogatories. OKLA. STAT. tit. 12, § 549(a) (1981) (repealed 1982).

140. The New Code provides that once the responding party serves objections to the interrogatories, "[t]he party submitting the interrogatories may move for an order under subsection A of section 14 of the Discovery Code with respect to any objection to or other failure to answer an interrogatory." Oklahoma Discovery Code, ch. 198, § 10(A), 1982 Okla. Sess. Law Serv. 422, 434-35 (West) (to be codified at OKLA. STAT. tit. 12, § 3210(A)). Section 14(A), referred to in § 10(A), is the provision for a motion to compel discovery. *Id.* § 14(A), 1982 Okla. Sess. Law Serv. at 439 (to be codified at OKLA. STAT. tit. 12, § 3214(A)).

The provision in § 10(A) placing the burden of going forward on the interrogating party if objections are made is the same as that in FED. R. CIV. P. 33(a). See FED. R. CIV. P. 33 advisory committee note on the 1970 amendment ("[I]f objections are made, the burden is on the interrogating party to move under Rule 37(a) for a court order compelling answers . . .").

Under OKLA. STAT. tit. 12, § 549(a) (1981) (repealed 1982), the party who objected to answering an interrogatory was supposed to simultaneously serve notice of a hearing on those objections. This appeared to place the burden on the objecting party to dispose of the objections. See *Adams II*, *supra* note 1, at 667-68 & n.53; *Dunagan & Ricketts*, *supra* note 134, at 166 (comparing federal practice under rule 33 to state practice under § 549). As a matter of practice, this procedure was virtually ignored.

See generally *Adams II*, *supra* note 1, at 660-63 (use and limitations of interrogatories); *Dunagan & Ricketts*, *supra* note 134, at 165-66 (use and advantages of interrogatories).

141. *Exxon Co. v. District Court of Kingfisher County*, 571 P.2d 1228, 1230 (Okla. 1977); *Warren v. Myers*, 554 P.2d 1171, 1173 (Okla. 1976); *Adams II*, *supra* note 1, at 663 & nn.28-29; see OKLA. STAT. tit. 12, § 549(a) (1981) (repealed 1982) ("Interrogatories may relate to any matters which can be inquired into by deposition . . ."). See generally *Adams II*, *supra* note 1, at 663-65 (discussing scope of interrogatories).

142. See *supra* notes 20-48 and accompanying text.

interrogatories with the option to produce business records.¹⁴³ As mentioned earlier, parties have a duty to furnish after-acquired information "seasonably."¹⁴⁴

Under the repealed statutes, answers to interrogatories had to "be signed by the person making them."¹⁴⁵ The New Code requires that the answers "be signed by the person making them, and the objections signed by the attorney making them."¹⁴⁶ In addition, the New Code imposes a duty on an attorney to sign every discovery response or objection, which signing,

[c]onstitutes a certification that he has read the . . . response or objection, and that it is . . . [t]o the best of his knowledge, information and belief formed after a reasonable inquiry consistent with the Discovery Code and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law . . . [i]nterposed in good faith and not primarily to cause delay . . . and . . . [n]ot unreasonable or unduly burdensome.¹⁴⁷

143. The New Code provides,

Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries thereof. A specification shall be in sufficient detail to permit the party submitting the interrogatory to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

Oklahoma Discovery Code, ch. 198, § 10(C), 1982 Okla. Sess. Law Serv. 422, 435 (West) (to be codified at OKLA. STAT. tit. 12, § 3210(C)). This provision is identical to FED. R. CIV. P. 33(c). There was no similar "business records option" available under the old statutes to a party answering interrogatories in an Oklahoma proceeding. See Dunagan & Ricketts, *supra* note 134, at 166 (comparing interrogatory practice under federal rules with state practice under the old statutes).

The option to produce business records should relieve a party answering an interrogatory in an Oklahoma proceeding of a burdensome or expensive search of his own business records to supply an answer by providing an option to make the records available and placing the burden on the asking party. See FED. R. CIV. P. 33 advisory committee note on the 1970 amendment. At the same time, the requirement that a party exercising the option sufficiently describe the records in which the answer to the interrogatory may be found so that the asking party can find them protects against an abuse of the option by a party who would deliver a mass of records in an attempt to frustrate the search for the answer. See FED. R. CIV. P. 33 advisory committee note on the 1980 amendment.

144. Oklahoma Discovery Code, ch. 198, § 3(E), 1982 Okla. Sess. Law Serv. 422, 424-25 (West) (to be codified at OKLA. STAT. tit. 12, § 3203(E)); see *supra* note 48.

145. OKLA. STAT. tit. 12, § 549(a) (1981) (repealed 1982).

146. Oklahoma Discovery Code, ch. 198, § 10(A), 1982 Okla. Sess. Law Serv. 422, 434-35 (West) (to be codified at OKLA. STAT. tit. 12, § 3210(A)).

147. *Id.* § 3(G), 1982 Okla. Sess. Law Serv. at 425-26 (to be codified at OKLA. STAT. tit. 12, § 3203(G)).

The failure to so certify an answer or objection to an interrogatory not only would make the response "ineffective," but also would subject an attorney or a party to sanctions, including "reasonable expenses occasioned thereby, including a reasonable attorney's fee."¹⁴⁸

X. REQUEST FOR ADMISSIONS

Section 3010 of Oklahoma's new Evidence Code¹⁴⁹ had recently revised the procedures for requesting admissions, making them substantially similar to rule 36 of the Federal Rules of Civil Procedure as it existed prior to its 1970 amendment.¹⁵⁰ The New Code repeals section 3010.¹⁵¹ The time for responding to requests for admissions under the New Code is now the same as the time for responding to interrogatories.¹⁵² Another change promulgated by the New Code is that the answering party can no longer deny a matter because of a lack of information or knowledge "unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny."¹⁵³ Further, a party can now move to determine the sufficiency of answers or objections.¹⁵⁴

148. *Id.*; see *supra* notes 57-62 and accompanying text.

149. OKLA. STAT. tit. 12, § 3010 (1981) (enacted 1979, repealed 1982).

150. For the text of rule 36, both before and after its 1970 amendment, see Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487, 530-31 (1970). See Adams II, *supra* note 1, at 669-70.

151. The New Code also repeals OKLA. STAT. tit. 12, § 481 (1981) which dealt with the admission of the genuineness of writings. Oklahoma Discovery Code, ch. 198, § 16, 1982 Okla. Sess. Law Serv. 422, 441-42 (West). The provision for request for admission in the New Code is the same as that in FED. R. CIV. P. 36. See Oklahoma Discovery Code, ch. 198, § 13, 1982 Okla. Sess. Law Serv. 422, 437-38 (West) (to be codified at OKLA. STAT. tit. 12, § 3213).

152. The party must respond to the request within 30 days after it is served on him, except that a defendant is given 45 days from the service of summons to respond to any request for admission served on him. Oklahoma Discovery Code, ch. 198, § 13(A), 1982 Okla. Sess. Law Serv. 422, 437 (West) (to be codified at OKLA. STAT. tit. 12, § 3213(A)); see *id.* § 10(A), 1982 Okla. Sess. Law Serv. at 434-35 (to be codified at OKLA. STAT. tit. 12, § 3210(A)). The old statutes required a response within four days for a request pursuant to § 481 and within 20 days if the request were made pursuant to § 3010. See OKLA. STAT. tit. 12, §§ 481, 3010 (1981) (repealed 1982); Adams II, *supra* note 1, at 673-74.

153. Oklahoma Discovery Code, ch. 198, § 13(A), 1982 Okla. Sess. Law Serv. 422, 437-38 (West) (to be codified at OKLA. STAT. tit. 12, § 3213(A)). There was no similar requirement in the old statute, OKLA. STAT. tit. 12, § 3010 (1981) (repealed 1982), which was substantially similar to FED. R. CIV. P. 36(a) as it read prior to the 1970 amendment of rule 36. The 1970 amendment added this requirement to rule 36(a). The Advisory Committee noted that this requirement merely places a reasonable burden on a party to fulfill his duties to complete discovery, thereby facilitating trial preparation and easing the trial process. See FED. R. CIV. P. 36 advisory committee note on the 1970 amendment. There was a line of cases prior to the amendment which allowed a party to make a denial for lack of knowledge or information without seeking any additional information. See *id.*

154. "The party who has requested the admission may move to determine the sufficiency of the answers or objections." Oklahoma Discovery Code, ch. 198, § 13(A), 1982 Okla. Sess. Law

The New Code also includes a specific provision allowing for the amendment or withdrawal of an admission.¹⁵⁵

XI. PRODUCTION OF DOCUMENTS AND TANGIBLE THINGS

The New Code section¹⁵⁶ on the production of documents and things and entry upon land for inspection and other purposes is essentially the same as the federal procedure.¹⁵⁷ The New Code does, however, provide for the inspection of property of a nonparty which is not allowed under the federal rules.¹⁵⁸ Except for the omission of the requirement for a prior showing of "good cause," the New Code and the repealed statutes are similar.¹⁵⁹ The time limit for response under the

Serv. 422, 437-38 (West) (to be codified at OKLA. STAT. tit. 12, § 3213(A)). See FED. R. CIV. P. 36(a). There was no such provision in the old statute. See OKLA. STAT. tit. 12, § 3010 (1981) (repealed 1982).

155. The court may permit withdrawal or amendment of an admission when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.

Oklahoma Discovery Code, ch. 198, § 13(B), 1982 Okla. Sess. Law Serv. 422, 438 (West) (to be codified at OKLA. STAT. tit. 12, § 3213(B)). This is the same as the provision in FED. R. CIV. P. 36(b). See *St. Regis Paper Co. v. Upgrade Corp.*, 86 F.R.D. 355, 357 (D.C. Mich. 1980) (court may, in its discretion, allow party to amend or withdraw admission where it would facilitate presentation of the merits of the case unless the requesting party satisfies the court that amendment or withdrawal would prejudice the requesting party's case).

156. Oklahoma Discovery Code, ch. 198, § 11, 1982 Okla. Sess. Law Serv. 422, 435-36 (West) (to be codified at OKLA. STAT. tit. 12, § 3211).

157. FED. R. CIV. P. 34.

158. A party may obtain a court order allowing him the same access to inspect the property in the possession, custody, or control of a nonparty that the court could have ordered under § 11(A). The party seeking discovery must make a motion and must show (1) that he has substantial need of the materials to prepare his case and (2) that he cannot obtain a substantial equivalent of the materials without undue hardship. See Oklahoma Discovery Code, ch. 198, § 11(C), 1982 Okla. Sess. Law Serv. 422, 436 (West) (to be codified at OKLA. STAT. tit. 12, § 3211(C)). This showing is the same as that which a party seeking discovery of work product must make under both the New Code and the federal rules. See *id.* § 3(B)(2), 1982 Okla. Sess. Law Serv. at 423 (to be codified at OKLA. STAT. tit. 12, § 3203(B)(2)); FED. R. CIV. P. 26(b)(3). The Advisory Committee on the Federal Rules has noted the desirability of the inclusion of such a provision in the federal rules. FED. R. CIV. P. 34 advisory committee note on the 1970 amendment; see *Adams II*, *supra* note 1, at 683 n.133.

The failure of a nonparty to comply with an order issued pursuant to § 11(C) may be treated as contempt of court. Oklahoma Discovery Code, ch. 198, § 14(B)(2)(f), 1982 Okla. Sess. Law Serv. 422, 440 (West) (to be codified at OKLA. STAT. tit. 12, § 3214(B)(2)(f)).

Inspection of property in the possession of a nonparty was available in Oklahoma prior to the New Code pursuant to OKLA. DIST. CT. R. 12. See *Adams II*, *supra* note 1, at 675-77, 682-83; *Dunagan & Ricketts*, *supra* note 134, at 167.

159. Compare Oklahoma Discovery Code, ch. 198, § 11(B), 1982 Okla. Sess. Law Serv. 422, 435-36 (West) (to be codified at OKLA. STAT. tit. 12, § 3211(B)), which provides that a request to produce or inspect be served without leave of court, with OKLA. STAT. tit. 12, § 548 (1981) (repealed 1982), which requires a court order upon a motion showing good cause. See *Adams II*, *supra* note 1, at 678-682; *Dunagan & Ricketts*, *supra* note 134, at 167-68.

old statutes was a "reasonable time."¹⁶⁰ The time limit under the New Code is now the same as that for interrogatories.¹⁶¹

XII. INSPECTION OF PROPERTY OF A NONPARTY

The New Code section¹⁶² is virtually identical to Oklahoma District Court Rule 12 regarding inspection of the property of a nonparty.¹⁶³ The judicial rule is now incorporated into the statutory law of Oklahoma. Under the court rule, notice is required, but no time period is established.¹⁶⁴ Under the New Code, the period is ten days.¹⁶⁵ Finally, Oklahoma adopts Federal Rule 34(c) which authorizes an independent action to acquire documents or to enter land.¹⁶⁶

XIII. MEDICAL EXAMINATIONS

Discretionary power was given to trial courts to order medical examinations in personal injury actions in 1962.¹⁶⁷ The Workers Compensation Court also has statutory authority to order medical examinations.¹⁶⁸ One of the repealed statutes¹⁶⁹ implicitly gave trial courts the power to order medical examinations in connection with a

160. See OKLA. STAT. tit. 12, § 548 (1981) (repealed 1982).

161. A party must serve a written response within 30 days of service of the request to produce or inspect, except that a defendant may serve a response within 45 days of service of summons on him. Oklahoma Discovery Code, ch. 198, § 11(B), 1982 Okla. Sess. Law Serv. 422, 435-36 (West) (to be codified at OKLA. STAT. tit. 12, § 3211(B)); see *id.* § 10(A), 1982 Okla. Sess. Law Serv. at 434-35 (to be codified at OKLA. STAT. tit. 12, § 3210(A)) (time limit for response to interrogatories).

162. *Id.* § 11(C), 1982 Okla. Sess. Law Serv. at 436 (to be codified at OKLA. STAT. tit. 12, § 3211).

163. See *supra* note 158.

164. See OKLA. DIST. CT. R. 12; Adams II, *supra* note 1, at 683.

165. "The notice shall state the date, time and place of the hearing on the motion and the date shall be not less than ten (10) days after the service on the person in possession, custody or control." Oklahoma Discovery Code, ch. 198, § 11(C)(2), 1982 Okla. Sess. Law Serv. 422, 436 (West) (to be codified at OKLA. STAT. tit. 12, § 3211(C)(2)).

166. "This section does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land." *Id.* § 11(D) (to be codified at OKLA. STAT. tit. 12, § 3211(D)); see FED. R. CIV. P. 34(c).

167. *Witte v. Fullerton*, 376 P.2d 244 (Okla. 1962). In overruling the holdings in the case of *City of Kingfisher v. Altizer*, 13 Okla. 121, 74 P. 107 (1903), the court held that "in all cases tried subsequent to the issuance of the mandate in this case, the trial court upon a timely request therefor, shall have discretionary power to require the plaintiff in a personal injury action to submit to a physical examination." *Witte*, 376 P.2d at 248; see Note, *Trial Practice: Power of Trial Court to Order a Party to Submit to Medical Examination*, 17 OKLA. L. REV. 350 (1964). The author notes the rule promulgated by the decision in *Witte*. He then goes on to assert that the rule is limited to the order of physical examination and does not allow for the order of mental examinations. *Id.* at 350-51.

168. See OKLA. STAT. tit. 85, § 25 (1981).

169. OKLA. STAT. tit. 12, § 425 (1981) (repealed 1982).

tort action or a workers' compensation proceeding by giving these parties the right to a copy of the examination.¹⁷⁰

The New Code section concerning the physical and mental examination of persons¹⁷¹ is similar to Federal Rule 35.¹⁷² The New Code, however, differs from rule 35 in that it shifts the burden of proof from the party seeking the examination to the party objecting to it.¹⁷³

The New Code is broader than the federal rules in that it allows a party to take a medical examination of an adverse party without a court order and without the showing of "good cause" required in Federal Rule 35(a) if the physical or mental condition of the adverse party is "in controversy" and the adverse party has asserted his condition as an element of his claim or defense.¹⁷⁴ If the physical or mental condition of the adverse party is in controversy, but the adverse party has not asserted it as a part of his claim or defense, then the New Code, like rule 35(a), requires that the party seeking to take the examination obtain a court order after a showing of "good cause."¹⁷⁵ The person who

170. Adams II, *supra* note 1, at 689-90.

171. Oklahoma Discovery Code, ch. 198, § 12, 1982 Okla. Sess. Law Serv. 422, 436-37 (West) (to be codified at OKLA. STAT. tit. 12, § 3212).

172. FED. R. CIV. P. 35.

173. The New Code allows an adverse party to take an examination of a party or person in custody or under the legal control of a party whenever the physical or mental condition of the party or person in his custody or legal control is in controversy and the person to be examined relies on that condition as an element of his claim or defense. Oklahoma Discovery Code, ch. 198, § 12(A), 1982 Okla. Sess. Law Serv. 422, 436 (West) (to be codified at OKLA. STAT. tit. 12, § 3212(A)). The party seeking to take the examination is required to serve a request on the person to be examined and on all other parties. The person must then submit to the examination or file a motion objecting to the examination, setting out the reasons his condition is not in controversy. *Id.* § 12(B), 1982 Okla. Sess. Law Serv. at 436-37 (to be codified at OKLA. STAT. tit. 12, § 3212(B)). The New Code specifically provides that "[t]he burden of proof is on the person objecting to the examination." *Id.*

If the physical or mental condition of the party or person in his custody or control is in controversy, but is not an element of that person's claim or defense, the burden of proof would be on the party seeking to take the examination. In such a situation, the New Code, like FED. R. CIV. P. 35(a), requires the party seeking to take the examination to make a motion showing good cause. See Oklahoma Discovery Code, ch. 198, § 12(C), 1982 Okla. Sess. Law Serv. 422, 437 (West) (to be codified at OKLA. STAT. tit. 12, § 3212(C)).

174. See Oklahoma Discovery Code, ch. 198, § 12(A), (B), 1982 Okla. Sess. Law Serv. 422, 436-37 (to be codified at OKLA. STAT. tit. 12, § 3212(A), (B)); FED. R. CIV. P. 35(a); *supra* note 173.

175. See Oklahoma Discovery Code, ch. 198, § 12(C), 1982 Okla. Sess. Law Serv. 422, 437 (West) (to be codified at OKLA. STAT. tit. 12, § 3212(C)); FED. R. CIV. P. 35(a); *supra* note 173.

This dichotomy in the New Code, allowing an adverse party to take the examination of a party or person in his custody or legal control when the physical or mental condition of the person is asserted as an element of the party's claim or defense merely upon the service of a request, but requiring a court order upon a showing of good cause when the physical or mental condition is in controversy but not an element of the person's claim or defense, is consistent with the reasoning of the Supreme Court in *Schlagenhauf v. Holder*, 379 U.S. 104 (1964). In either situation, § 12 requires that the physical or mental condition be "in controversy." See Oklahoma Discovery Code,

can be ordered to have a physical examination under the New Code not only includes a party, it now also includes "a person in the custody or under the legal control of a party."¹⁷⁶ Paragraph D of the New Code section on medical examinations also allows the person to be examined to have his own physician present at the time of the examination.¹⁷⁷

XIV. SUMMARY

The New Code is a positive step for Oklahoma law because it ac-

ch. 198, § 12(A), (C), 1982 Okla. Sess. Law Serv. 422, 436-37 (West) (to be codified at OKLA. STAT. tit. 12, § 3212(A), (C)).

In *Schlagenhauf*, the Court interpreted the "good cause" and "in controversy" requirements of rule 35. See 379 U.S. at 106, 108-09. The Court stated that these elements must be met in each case. *Id.* at 118-19. However, the Court recognized that the quantum of proof required to show that a person's physical or mental condition is "in controversy" varies according to the situation.

This does not, of course, mean that the movant must prove his case on the merits in order to meet the requirements for a mental or physical examination.

. . . [T]here are situations where the pleadings alone are sufficient to meet these requirements. A plaintiff in a negligence action who asserts mental or physical injury places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury. This is not only true as to a plaintiff, but applies equally to a defendant who asserts his mental or physical condition as a defense to a claim, such as, for example, where insanity is asserted as a defense to a divorce action.

Id. at 119 (citations omitted).

In enacting § 12(A), the Oklahoma Legislature has recognized that when a person asserts his physical or mental condition as an element of his claim or defense, he has, as the Supreme Court noted in *Schlagenhauf*, clearly placed that condition in controversy and provided good cause for the examination. Section 12(C) should ease the burden on the courts and facilitate the discovery process by obviating the need for resort to a court in cases where there is no real question as to whether the party's physical or mental condition is "in controversy."

Section 12(C) still provides protection for the person to be examined since it allows him to object to the examination and to obtain a court order preventing the examination. The objecting person, however, bears the burden of proof of showing his physical or mental condition is not in controversy. See Oklahoma Discovery Code, ch. 198, § 12(C), 1982 Okla. Sess. Law Serv. 422, 437 (West) (to be codified at OKLA. STAT. tit. 12, § 3212(C)).

176. Oklahoma Discovery Code, ch. 198, § 12(A), 1982 Okla. Sess. Law Serv. 422, 436-37 (West) (to be codified at OKLA. STAT. tit. 12, § 3212(A), (C)). FED. R. CIV. P. 35(a) contains this same provision.

Prior to the enactment of § 12, case law specifically allowed a trial court to order a plaintiff in a personal injury suit to submit to a physical examination. *Witte v. Fullerton*, 376 P.2d 244, 248 (Okla. 1962). Although the legislature implicitly approved the exercise of the Oklahoma courts' power to order medical examinations by enacting OKLA. STAT. tit. 12, § 425 (1981) (repealed 1982), there were no definitive guidelines concerning who could be forced to submit to an examination. See *Vliet, Pretrials and Discovery*, 34 OKLA. B.J. 1894, 1900-01 (1963). Section 12 now provides an explicit statement concerning who can be examined. Cf. FED. R. CIV. P. 35(a) advisory committee note on the 1970 amendment.

177. Oklahoma Discovery Code, ch. 198, § 12(D), 1982 Okla. Sess. Law Serv. 422, 437 (West) (to be codified at OKLA. STAT. tit. 12, § 3212(D)). There is no comparable provision in FED. R. CIV. P. 35. However, the courts generally allow the party being examined to select his own physician unless the parties cannot agree, in which case the court will appoint one. See *Liechty v. Terrill Trucking Co.*, 53 F.R.D. 590, 591 (E.D. Tenn. 1971); *Adams II*, *supra* note 1, at 689 n.172.

completes two things. First, it simplifies research of discovery law by gathering it in one place. Second, the New Code is a major step toward unifying state and federal procedural rules both as to substance and as to form. These accomplishments should enhance the efficient use of discovery procedures in both forums.

This Article has updated Professor Adams' series of articles by setting forth the changes in Oklahoma discovery practice made by the New Code. It has also compared and contrasted the New Code with the Federal Rules of Civil Procedure regarding discovery.

This writer applauds the enactment of the New Code for its explicit delineation of the powers of the court and the duties of counsel in relation to discovery in civil litigation. It remains to be seen whether the powers will be properly exercised and the duties met.